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UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Petitioners,

vs.

SUN EXPLORATION AND PRODUCTION CO.
a Delaware Corporation, and
SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,

Respondent.

PETITION FOR WRIT OF CERTIORARI: TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the District Court departed from the accepted and usual course of judicial proceedings in granting summary judgment on Count I of Plaintiff's complaint when facts establishing a genuine issue for trial had been conclusively established on previous litigation.

B. Whether the District Court incorrectly granted summary judgment by relying on a case that was still under appeal when it found that Plaintiffs were collaterally estopped from raising claims set forth in Counts III and IV of Plaintiffs Amended Complaint

C. Whether it is an abuse of discretion for a Court to impose Rule II sanctions when any orders or decisions relating to admissibility of evidence are still subject to revision under Rule 54 and Plaintiff proceeds with a reasonable factual theory of the case and an objective belief that unfavorable prior orders were still subject to revision.

D. Whether Rule II sanctions as applied in this case do not comply with Due Process.

STATEMENT OF JURISDICTION

This matter was originally filed in Wayne County Circuit Court, Detroit, Michigan. A timely Petition for Removal to the United States District Court for the Eastern District of Michigan, Southern Division, was filed by the Appellees on February 9, 1987. The basis for such removal was diversity of jurisdiction pursuant to 28 USC §1332(a)(1). The Plaintiff-Appellants are residents of Grosse Pointe, Michigan, and the Defendant-Appellees are incorporated and operate their business in the State of Delaware. Final Judgment disposing of all claims was entered in the District Court on July 8, 1992. The Notice of Appeal was filed on August 4, 1992 in the United States Court of Appeals for the Sixth Circuit pursuant to 28 USC §2107 and FRAP 4(a). The Sixth Circuit issued its final judgment on March 30, 1994.

Writ of Certiorari is requested pursuant to Supreme Court Rule 10.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The United States Court of Appeals sanctioned such a departure by the United States District Court for the Eastern District of Michigan as to call for an exercise on this Honorable Court's power of supervision.

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I. STATEMENT OF THE CASE

The factual basis for this action began in 1971, when the owners of tracts 1, 2, and 6 of the Columbus III oil field in Michigan, the Koziaras, assigned overriding royalty interests in the tracts to the law firm of Dietrich & Schrauger. In 1972, the law firm assigned its interest to Helen Spalter, the mother of plaintiff Edgar Dietrich, for life remainder to Katherine Dietrich, Edgar Dietrich's daughter. On June 1, 1984, Katherine Dietrich reassigned her interest to the Plaintiffs.

Plaintiffs brought this action in Michigan State Court in 1987, alleging that the Defendant oil company had illegally drained oil from the field, had failed to compensate them for oil drained from the field, and had in other ways improperly managed the field. The Defendants removed the case to Federal Court on diversity grounds, and Plaintiffs subsequently filed an Amended Complaint, alleging the following:

> **Count I:** Defendants illegally drained 36,417.5 barrels of oil from the oil field in which the Plaintiffs held an interest during the period from

November 1, 1971 to June 30, 1974;

Count II: Defendants illegally overproduced oil from the field in addition to that alleged in Count I, in breach of their fiduciary duty to the Plaintiffs;

Count III: Defendants negligently or intentionally breached their duty to Plaintiffs by failing to use the care and skill of an ordinary oil producer, including under-reporting oil reserves, sabotaging wells, and persuading witnesses to give false testimony at earlier administrative proceedings;

Count IV: Defendants fraudulently induced Plaintiffs or their predecessors to sign a unitization agreement in 1974.

Count V: Defendants failed to compensate Plaintiffs for 881,071 barrels of oil allegedly produced by Defendants from November, 1984 to March, 1985.

Pursuant to Defendants' first motion for summary judgment, the District Court disposed of Count II in favor of the Defendants. Plaintiffs did not contest the disposition of Count II.

Defendants filed a subsequent motion for summary judgment, which the District Court granted on February 10, 1992 for Counts I, III and IV. See Dietrich v. Sun Exploration and Production Co., 784 F.Supp. 383 (E.D. Mich. 1992). (R.8 Memorandum Opinion and Order)

Subsequent to the February 10, 1992 Opinion and Order Granting Summary Judgment to all claims except those on Count V, the parties, pursuant to an Order of April 14, 1992, appeared at a final pretrial conference on June 8, 1992. The Final Pretrial Order was entered on that date. The Final Pretrial Order did not set the date of trial, but the Court had assured both sides that several weeks' notice would be given to the parties and counsel. (R.7 Amended Order) Plaintiffs were not informed of the date of trial until just a few days before the trial was to commence, when the Court Clerk advised that a jury would be selected on July 1, 1992 and that a trial would start July 2, 1992. On July 1, 1992 Plaintiffs filed two Motions in Limine. One was entitled, "Motion in Limine to Clarify and/or Amend Final Pretrial Order" and the second Motion was entitled, "Motion in Limine Regarding Introduction of the Wronski and Streeter Opinions for the Limited Purpose of Impeachment and Absence of Mistake." In filing these motions, Plaintiffs sought to amend the final pretrial order in order to

correct technical problems with the time period specified in their complaint and to seek an evidentiary ruling on the limited use of a previous case pertaining to the illegal drainage of the same oil field at issue in the instant case by the same Defendants.

The District Court denied both of Plaintiff's motions, as well as Plaintiff's request to adjourn, and granted Defendant's Motion for Summary Judgment as a matter of law. An Opinion and Order was entered on July 8, 1992, and a Judgment of Dismissal executed on the same date. (R.4 Opinion and Order) The Court also imposed sanctions under Rule 11 for Plaintiff's pursuit of Count V, which the Court classified as a factually unsubstantiated claim. (R.3 Opinion and Order Granting Sanctions)

Plaintiffs timely noticed their appeal on August 4, 1992 to the United States Court of Appeals for the Sixth Circuit. On March 30, 1994 the Court of Appeals affirmed the District Court. (R.1 Sixth Circuit Opinion)

Plaintiffs now seek review on Certiorari to the

United States Supreme Court.

II. ARGUMENT

A. IN GRANTING SUMMARY JUDGMENT ON COUNT I OF PLAINTIFF'S COMPLAINT THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BECAUSE FACTS ESTABLISHING A GENUINE ISSUE FOR TRIAL HAD BEEN CONCLUSIVELY ESTABLISHED IN PREVIOUS LITIGATION.

Count I of Plaintiff's complaint alleges that Defendants failed to compensate them for over 36,000 barrels of oil that Defendants illegally drained from Tracts 1, 2 and 6 of the Columbus III oil field between November 1, 1971 and June 30, 1974. Plaintiffs assert that the Michigan Court of Appeals decision in Wronski v. Sun Oil Co., 89 Mich.App. 11 279 NW2d 564 (1979) lv den 407 Mich 863 (1979) (Wronski I) at the very minimum establishes that a genuine issue of material fact exists, and therefore, the granting of Defendant's motion for summary judgment was in error.

In the case at bar, the issue conclusively decided

in Wronski I of whether Appellees drained oil from Tracts 1, 2 and 6 of the Columbus oil field was material because it would have established the cause of action asserted by appellants and precluded appellees from arguing contrary as part of their defense. Indeed, in his February 10, 1992 Opinion and Order, Judge Gadola stated:

> Plaintiff's claim that Defendants drained oil from Tracts 1, 2 and 6 of the Columbus oil field. This has conclusively been established in Wronski I and Defendants cannot re-litigate that issue. (R.8: Memorandum Opinion and Order).

In deciding to grant a motion for summary judgment, the record must demonstrate that no genuine issue of material fact remains, and the record and evidence must be reviewed via the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Anderson v Liberty Lobby, 477 U.S. 242, 249 (1986); Celotex Corp. v Catrett, 477 U.S. 317, 325 (1986); Niecko v Emro Marketing Co., 973 F.2d 1296 (6th Cir. 1992).

In Kendall v. Hoover Co., 751 F.2d 171, 174 (1984): the Court defined "material fact" in the context of a motion for summary judgment as follows;

> **Summary judgment.** In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is "material" if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. Austin v. Wilder, 26 N.C.App. 229, 215 S.E.2d 794, 796. See Fed.R.Civ.P. 56(c).
>
> A fact is "material" and precludes grant of summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights and obligations of the parties. Johnson v. Soulis, Wyo., 542 P.2d 867, 872 (1975).

Appellants were the non-moving parties in the third effort by Appellees at getting the case dismissed without trial. The U.S. Supreme Court has stated the test in

ruling on a Rule 56 motion. In Lujan v National Wildlife Federation, 497 US ____, 111 LEd 2d 695 (1990), the Court said:

> "[11] . . . In ruling upon a Rule 56 Motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment 'shall be entered' against the non-moving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." (111 LEd 2d at p 716).

The Supreme Court in 1986 in a trio of cases stressed the importance of summary judgment procedures

as a means of isolating and disposing of factually unsupported claims or defenses. In Matsushita Electric Industrial Co. v Zenith Radio, 475 US 574, 89 LEd 2d 538 (1986); Anderson v Liberty Lobby, Inc., 477 US 242, 91 LEd 2d 202 (1986); and Celotex Corp v Catarett, 477 US 317, 91 LEd 2d 265 (1986), the Supreme Court outlined the burden that the moving party must carry. The Court in Celotex said:

> "Under Rule 56 (c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning as essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law' because the non-moving party has failed to make a

> sufficient showing on an essential element of her case with respect to which she has the burden of proof." (477 US at p 323, 91 LEd 2d at p 273).

However, in Anderson, supra, the Court, in noting the District Judge's role, stated:

> "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the Judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." (477 US at p 249, 91 LEd 2d at p 212).

Using the facts established in Wronski I and viewing Appellee's Motion for Summary Judgment in the light most favorable to the non-moving party, it is clear that the District Court erred in granting summary judgment on Count I, and in so doing departed from the accepted and usual course of judicial proceedings. Not only did the finding of illegal drainage set forth in Wronski I have the effect of establishing Plaintiff's claim

that illegal drainage of oil occurred during a period of time asserted by Plaintiffs, but the facts found in Wronski I had the effect of refuting Defendant's defense that such illegal drainage did not occur.

The role of the District Judge in determining whether to grant summary judgment is not to weigh the evidence or to determine the truth of the matter but to determine whether there is a genuine issue for trial. In the case at bar it is clear that the District Court erred in granting summary judgment, and this error resulted in a deviation from the accepted and usual course of judicial proceedings. The facts and finding set forth in Wronski I clearly indicate that there was a genuine issue for trial, and as such summary judgment is inappropriate.

The District Court's decision in granting summary judgment and the Court of Appeals sanctioning of this deviation call for an exercise of this Honorable Court's power of supervision and the reversal of the decision granting summary judgment.

B. THE DISTRICT COURT INCORRECTLY GRANTED SUMMARY JUDGMENT BY RELYING ON A CASE THAT WAS STILL UNDER APPEAL WHEN IT FOUND THAT PLAINTIFF'S WERE COLLATERALLY ESTOPPED FROM RAISING CLAIMS SET FORTH IN COUNTS III AND IV OF PLAINTIFFS AMENDED COMPLAINT.

Count III specifically alleged that the defendants incorrectly interpreted geological and reservoir data, failed to represent plaintiffs' interests adequately before the Michigan Department of Natural Resources at the 1974 unitization hearings, under-reported oil and gas reserves, sabotaged a well ("the 6-3 Well") with cement, and persuaded geologists and other witnesses to give false testimony at the unitization hearings. On summary judgment Plaintiffs offered the affidavit and report of Dr. Joshi, a petroleum engineer and expert witness. Plaintiffs argue that the expert's report and opinions create genuine issues of material fact which make summary judgment on Count III improper.

In Count IV, plaintiffs allege that Defendants'

misrepresentation of geological and reservoir data to the Michigan Department of Natural Resources induced Plaintiffs and/or their predecessors to sign the 1974 unitization plan, thereby denying them their fair share of the unitization production. In effect, Plaintiffs challenge the fairness and validity of the 1974 unitization plan. Plaintiffs again relied on statements and conclusions of their expert witness' affidavit to create material issues of fact.

The District Court found that Plaintiffs claims were collaterally estopped by an Administrative Law Judge ruling which was part of a case involving the Appellees, and therefore, the ruling in Wronski v. Sun Oil Co., 108 Mich 178, 310 NW2d 321 (1981) (Wronski II) collaterally estopped Plaintiffs' claims in Counts III and IV. Plaintiffs assert that they not only had sufficient evidence to create material issues of fact, but that the reliance on Wronski II was improper because Wronski II was currently under appeal and was not a final determination of the case.

Because the court was sitting in diversity and was considering the effect of a prior Michigan State Court judgment, Michigan law controls the law of collateral estoppel. Erie Railroad Co. v Tompkins, 304 U.S. 64, 78 (1938).

Under Michigan's law of collateral estoppel, when the initial forum is an administrative agency, the doctrine of collateral estoppel applies only when the procedures are adjudicatory in nature, when a method of appeal is provided, and when it is clear that the legislature intended to make the determination final in the absence of an appeal. Nummer v Treasury Dept., 200 Mich App 695 (1993); Storey v Meijer Inc., 431 Mich 368, 429 NW2d 169 (1988); Senior Accountants, Analysts & Appraisers Ass'n v Detroit, 399 Mich 449, 457-458; 249 NW2d 121 (1976)

In the case at bar, the District Court granted summary judgment upon Appellee's motion that Appellants were collaterally estopped by a case (Wronski II), that was currently being appealed before the

Michigan Supreme Court. As Michigan law requires that the determination be final only on the absence of an appeal, the granting of summary judgment based on collateral estoppel did not fully comport with the requirements of Michigan's law of collateral estoppel and therefore the granting of summary judgment on Counts III and IV constitute a gross departure from the accepted and usual course of judicial proceedings as to call for this Honorable Court's power of supervision and a reversal of the lower Court's decision.

C. IT IS AN ABUSE OF DISCRETION FOR A COURT TO IMPOSE RULE 11 SANCTIONS WHEN ANY ORDERS OR DECISIONS RELATING TO ADMISSIBILITY OF EVIDENCE WERE STILL SUBJECT TO REVISION UNDER RULE 54 AND PLAINTIFF PROCEEDED WITH A REASONABLE FACTUAL THEORY OF THE CASE AND AN OBJECTIVE BELIEF THAT UNFAVORABLE PRIOR ORDERS WERE STILL SUBJECT TO REVISION.

Plaintiffs and their counsel were sanctioned under Rule 11 of the Federal Rules of Civil Procedure for pursuit of an allegedly factually unsubstantiated claim. The Court imposed $19,735 in Rule 11 sanctions for Plaintiff's conduct in pursuing Count V from February 1992 (when all Counts except Count V were dismissed) until July 2, 1992 (the day set for trial). (R.3 Opinion and Order Granting Sanctions)

Plaintiffs assert that the Court abused its discretion in imposing sanctions because Plaintiffs had a reasonable belief that their motion to amend or clarify their pleadings would be granted and because under Rule 54 the previous orders of the Court were still subject to

revision pending a final adjudication of the case. Moreover, when the Court refused to grant its motions, counsel for Plaintiffs complied with the admonition of Rule 11 and candidly admitted in open court that Plaintiffs did not currently have evidence to support its allegations set forth in Count V. (R.5, Transcript, P.)

Ordinarily a District Court's imposition of Rule 11 Sanctions is entitled to deference and may not be disturbed except for abuse of discretion. Stevens v. Lawyers Mutual Liability Insurance Co., 789 F2d 1056, 1060 (4th Cir. 1986); Mann v. G & G Mfg., Inc. 900 F2d 953, 959 (6th Cir. 1990). Under Rule 11 a Court must examine the objective reasonableness of the claims in light of existing law and facts. Michigan National Bank v. Kroger Company, 619 F.Supp. 1149 (ED Mich,, 1985).

When evaluating a Rule 11 motion for sanctions, the district court "measure(s)" the conduct of the non-moving party's counsel "by an objective standard of reasonableness under the circumstances." Mann v G &

G Mfg., Inc., 900 F2d 953, 961 (6th Cir. 1990); INVST Financial Group, Inc. v Chemical Nuclear Systems, 815 F2d 391, 401 (6th Cir. 1987) cert. denied, 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed. 2d 251 (1987); Albright v Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986).

The District Court then weighs the evidence to determine if counsel's pleadings, motions or papers are well-grounded in fact or warranted by existing law. Westmoreland v CBS, Inc., 770 F2d 1168, 1174 (D.C. Cir. 1985).

In the case at bar, the District Court decision in imposing FRCP 11 Sanctions was an abuse of discretion because the Court failed to inquire what was reasonable and objective to believe at the time the Motion to Amend was submitted. Eavenson, Auchmuty and Greenwald v. Holtzman, 775 F2d 535 (CA 3, 1985).

In the instant case, it is certainly arguable on an objective basis that Appellants could reasonably conclude that a motion for an amendment to clarify a defect in the pleadings would be granted. It is well established that a

trial judge possesses the discretion to allow or prohibit parties from raising matters not raised in the pretrial order. Sample v Diecks, 885 F2d 1099, 1106 (3rd Cir. 1989). Moreover, under Rule 54 of the Federal Rules of Civil Procedure any orders are subject to revision at any time before the entry of judgment adjudicating all the claims of the parties. FRCP Rule 54 states as follows;

> (b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims

> or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the case at bar, Appellant's counsel, at the time of the submission of the Final Pretrial Order, clearly had the right to file a motion to amend. Appellant's counsel attempted to rectify a technical defect by filing a motion to amend to broaden the specified time period within which Appellants reasonably and objectively believed that Appellees had wrongfully produced oil. (R.6, Final Pretrial Order).

When the Court indicated that it was not amenable to or would not allow such an amendment, Appellants' counsel candidly admitted that he would be able to establish a time period prior to that recited in Count V but did not have evidence to support the specific allegation recited in Count V.

In the Committee Comments relative to Rule 11, the Committee indicated its intent as to when a party

should be subject to Rule 11 sanctions;

> "These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."

Appellants reasonably and objectively had reason to believe that the trial judge would exercise his discretion and allow Appellant's motion to amend and adjourn trial to permit a proceeding fair to both parties.

When the court indicated that it was not amenable to or would not allow such an amendment, Appellant's counsel represented in open court that he was unable to prove Count V. (R.5 July 2, 1992 Transcript, p. 37 and 48).

Appellees then moved for a judgment as a matter of law pursuant to FRCP 50(a) and the court granted the motion. Following dismissal of Count V the District Court imposed sanctions under Rule 11 against Appellants for pursuing Count V. (R.2 and R.3 Opinion

and Order)

The District Court's analysis suggests that different panels have reached differing results with respect to sanctions under these circumstances. In the case at bar, the District Court relied principally on Mann v. G & G Mfg., Inc., 900 F2d 953 (CA 6, 1990). In Mann, this Court stated:

> "We must grant the district court wide discretion to determine whether the conduct of plaintiffs' counsel was reasonable. The district court, however, 'is expected to avoid using the wisdom of hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted'". 900 F2d at p 958.

Under the language of Rule 54 it was objectively reasonable for Appellant to expect an opportunity to amend his pleading to correct technical problems with the complaint and to seek a revision of the court's previously entered orders. When Appellant's motion was denied, Appellant complied with the admonition of Rule 11 and candidly acknowledged that he did not have enough evidence to support the specified allegation and the

complaint was dismissed. Under the circumstances, the District Court's imposition of sanctions pursuant to Rule 11 constituted an abuse of discretion.

D. ADMINISTRATION OF RULE 11 SANCTIONS DOES NOT COMPLY WITH DUE PROCESS.

The administration of Rule 11 sanctions as they existed at the time sanctions were applied in the case at bar (and, as to the argument here advanced, at the present time) provides that the same judge who presides over the Court proceedings during which the questioned pleadings or conduct takes place determines whether to sanction that conduct and the appropriate sanctions.

Appellant here argues that there are two competing forces which come into play in administration of Rule 11 sanctions. On the one hand the trial judge best knows the extent, 'willfulness', and harmful extent of the questioned pleading or conduct. On the other hand the trial judge, as a matter of human nature, will have invested a measure of the judge's own emotional energy into the judge's rulings or position on the law. He will have a certain 'stake' in the outcome. It is human nature

that a judge is more likely to sanction a pleading or conduct the judge considers wrong because the judge disagrees with the pleading or conduct. The more forcefully litigant or litigant's counsel maintains the position opposite to that of the judge, the more likely the judge is to assess sanctions. Appellant submits that there is a reasonable way to avoid this potential prejudice. Appellant suggests that before sanctions are sought which could result in dismissal of a case or award of more than $2,500 in monetary sanctions, the matter should be determined by a three judge panel. The trial judge would be one member and two other members of the Court would also be appointed. This way the trial judge could express his arguments for sanctions but the other judges could provide more objectivity since they would not have the potential emotional stake in determination of the sanctions.

28 U.S.C. §455 (a) provides:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any

> proceeding in which his impartiality might reasonably be questioned."

Note that Appellant does not argue that the trial judge should be disqualified, but rather that his views be tempered by adding additional judges to the deliberations. Thus the case authority which holds:

> "Adverse legal rulings made by the judge, either in the case itself or in earlier related proceedings, do not constitute a basis for his disqualification under the statute, even though such rulings may have been erroneous."

2ALR Fed §917

are not dispositive of what Appellant urges here.

Somewhat analogous to what Appellant argues here is the issue of contempt, and whether the judge against which the contempt is shown may try the issue of sanctioning the contempt. See, for example, 'Contempt - Disqualification of Judge' 64 ALR 2d 600. See also 'Contempt - Summary Power' 3 L ed 2d 1855. As these, and various citations under 18 USC §401 make

clear, this does not appear to be a settled area of the law. Basically the current law on disqualification of Judges is as set forth in Schwartz, 'Disqualification for Bias in The Federal District Courts' 11 Univ Pitt L.Rev 415 (1950):

> If there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."

(Quoting from Law v. Chartered Institute of Patent Agents (1919) Z Ch 276, 289.

It is the appearance of bias as well as bias itself which must be avoided.

> "Due process requires that the tribunal be a fair and impartial one."

16 A Am Jur 2nd Constitutional Law §855

Appellant here urges that there is at least an appearance of unfairness by having the same judge who presides over the Court proceedings during which

questioned pleadings or conduct are involved determine, solely, whether to sanction that conduct and the appropriate sanctions. That appearance can be minimized by having a three judge panel, including the trial judge, decide the most serious sanctions issues.

III. CONCLUSION

Plaintiffs respectfully request that the United States Supreme Court grant Certiorari and remand the matter to District Court for trial on the merits and set aside the award of sanctions.

Respectfully submitted,

June 27, 1994

Stephen R. Baylerian (P41862)
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Appellants

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Description Of Entry	Filing Date	No.
Opinion, Sixth Circuit Court of Appeals	March 30, 1994	R.1
Order Directing Plaintiffs to Pay Sanctions to Defendants	Feb. 26, 1993	R.2
Opinion and Order Granting Defendants' Motion for Sanctions	August 28, 1993	R.3
Opinion and Order Denying Plaintiffs' Motions in Limine, Denying Plaintiffs' Motion to Adjourn, and Granting Defendants' Motion for Judgment as a Matter of Law	July 8, 1992	R.4
Transcript	July 2, 1992	R.5
Final Pretrial Order	June 1, 1992	R.6
Amended Order	April 14, 1992	R.7
Memorandum Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment	Feb. 10, 1992	R.8

NOT RECOMMENDED FOR PUBLICATION R-1

No. 92-1981/93-1442

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MARCH 30, 1994

Leonard Green, Clerk

Edgar J. Dietrich and)
)
Theresita Dietrich,)
)
Plaintiffs-Appellants,)
)
vs.

On Appeal from the United States District Court for Eastern District of Michigan

)
Sun Exploration and Production)
Company, a Delaware corporation,)
and Sun Operating Limited)
Partnership,)
)
Defendants-Appellees.)
)

Before: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges.

MERRITT, Chief Judge. This action involves plaintiffs' royalty interests in tracts of land in the Columbus III oil field in St. Clair County, Michigan, which is leased to and operated by defendants. Plaintiff sued, alleging in a five-count complaint various forms of misrepresentation and mismanagement of the field. After five and one-half years of discovery, the district court granted judgment for the defendants. Plaintiff appeal and court's judgement on four counts of their complaint, and appeal sanctions assessed against them for abusive litigation practices and under Rule 11. We affirm the judgement of the district court in all respects.

I.

The factual basis for this action began in 1971, when the owners of tracts 1,2, and 6 of the Columbus III oil field, the Koziaraz, assigned overriding royalty interests in the tracts to the law firm of Dietrich & Schrauger. In 1972, the law firm assigned its interest to Helen Spalter, the mother of plaintiff Edgar Dietrich, for life remainder to Katherine Dietrich, Edgar Dietrich's daughter. On June 1, 1984,

Katherine Dietrich reassigned her interest to plaintiffs.

Plaintiffs brought this action in Michigan state court in 1987, alleging that the defendant oil company had illegally drained oil from the field, had failed to compensate them for oil drained from the field, and had in other ways improperly managed the field. The defendants removed the case to federal court on diversity grounds, and plaintiff subsequently filed an amended complaint alleging the following:

> **Count I:** Defendants illegally drained 36,417.5 barrels of oil from the oil field in which the plaintiffs held an interest during the period from November 1, 1971 to June 30, 1974;
>
> **Count II:** Defendants illegally overproduced oil from the field in addition to that alleged in Count I, in breach of their fiduciary duty to the plaintiffs;
>
> **Count III:** Defendants negligently or intentionally breached their duty to plaintiff by failing to use the care and skill of an ordinary oil producer, including under-reporting oil reserves, sabotaging wells, and persuading witnesses to give false testimony at earlier administrative proceedings;
>
> **Count IV:** Defendants fraudulently induced plaintiffs or their predecessors to sign a unitization agreement in 1974.
>
> **Count V:** Defendants failed to compensate plaintiffs for 881,071 barrels of oil allegedly produced by defendants from November, 1984 to march, 1985.

Pursuant to defendants' first motion for summary judgment, the district court disposed of Count **II** in favor of the defendants. Plaintiff do not contest that disposition here and consequently we do not address it. Defendants filed a subsequent motion for summary judgment, which the district court granted on Counts **I, III and IV.** *See Dietrich v. Sun Exploration and Production Co.,* 784 F. Supp. 383 (E.D. Mich. 1992). Plaintiffs pursued Count V until the day of trial, July 2, 1992, at which point they admitted that they were unable to factually substantiate the claim. The district court granted judgment as a matter of law in favor of the defendants on the count, and dismissed the entire action. Plaintiff appeal the summary judgment disposition of Counts **I, III and IV,** which we address in Part **II** of this opinion. Plaintiff also appeal the district court's judgment as a matter of law on Count V, which we take up in Part **III** of this opinion.

The district court also imposed two monetary sanctions against the plaintiff during this litigation. in

1991, after the cause of action had been pending and discovery underway for almost four years, the district court assessed against the plaintiffs approximately $13,000 in reasonable costs and fees for abusive litigation practices. After dismissing the entire action in July of 1992, the court also imposed sanctions under Rule 11 for plaintiff' pursuit of Count V, a factually unsubstantiated claim. Plaintiff appeal both assessments, which we address in Part IV of this opinion.

II.

The district court disposed of Counts I, III and IV on summary judgment in favor of defendants. We review summary judgments *de novo*, applying the same standard as that applied by the district court. The record must demonstrate that no genuine issue of material fact remains, reviewing the record and evidence in the light most favorable to the non-moving party. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby,* 477 U.S. 242,249 (1986); *Celotax Corp. v. Catrett,* 477 U.S. 317,325 (1986); *Niecko v. Emro Marketing Co.*, 973 F.2d 1296 (6th Cir. 1992).

A.

Plaintiffs allege in Count I that the defendants failed to compensate them for over 36,000 barrels of oil that defendants illegally drained from tracts 1,2 and 6 of the Columbus III oil field between November 1, 1971 and June 30, 1974. Plaintiff argue that the Michigan Court of Appeals decision in *Wronski v. Sun Oil Co.*, 89 Mich. App. 11 (1979)(*"Wronski I"*), can be used offensively to collaterally estop the defendants from contesting the claim.

Wronski I began in April, 1975, when two parties with interests in the Columbus III filed (the Koziaras the Wronskis) filed an actio in Michigan state court, alleging that Sun Oil was overproducing the Columbus III field and converting oil in which they had an interest. They requested recision of their leases with Sun Oil, or in the alternative, sought damages for the over-production on their property. As part of its decision in favor of the plaintiffs in the

case, the trial court found that Sun Oil had drained illegally 50,000 barrels of oil from the Columbus III field during the time period of February 1, 1970 to June 30, 1974. The Michigan Court of Appeals affirmed the findings and judgment for the plaintiff. *Wronski vs. Sun Oil Co.*, 89 Mich. App. 11 (1979).

The district court found that *Wronski I* conclusively established that the defendants drained illegally 50,000 barrels of oil from the field during the period of February 1, 1970 to June 30, 1974. Plaintiff, however, held their interest in the property only form November 1, 1971 to June 30, 1974, creating time and property interest discrepancies between the two cases. Consequently, the district court found that plaintiffs would be required to present proof in addition to the *Wronski I* opinion to establish whether any of (or what percentage of) the illegal drainage established by *Wronski I* had occurred during February 1, 1970 to June 30, 1974. Because the plaintiff admitted that they had no additional evidence to substantiate the claim, the district court granted summary judgment in favor of defendants. *Dietrich v.*

Sun Exploration and Production Co., 784 F. Supp. 383, 387 (E.D. Mich. 1992).

Under Michigan's law of collateral estoppel, if mutuality exists between the parties, a judgment is conclusive in subsequent litigation only "as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action." *Howell v. Vito's Trucking and Excavating Co.*, 386 Mich. 37, 42 (1971)(quoting Restatement of the Law, Judgments, § 68 at 293-94); *Knoblauch v. Kenyon,* 163 Mich. App. 712,719-20 (1987). Assuming *arguendo* that mutuality exists, the district court was correct that plaintiffs cannot establish Count I solely through the use of offensive collateral estoppel. *Wronski I* is conclusive on the finding of the illegal drainage occurring between February 1, 1970 and June 30, 1974; but the parties did not litigate, and

the judgment does not establish, the amount of oil drained illegally during November 1, 1971 and June 30, 1974. *Wronski I* also does not establish that a steady stream was pumped from the field, the percentage pumped during any subperiod of time within the relevant time frame, or the value of oil drained during any subperiod. Thus, *Wronski I* cannot be used as the plaintiffs' only evidence of the amount of oil drained from the property between November 1, 1971 and June 30, 1974.

Plaintiff have failed to respond to the problem of lack of identity of issues actually litigated, continuing to argue on appeal that no additional evidence is necessary. Without such additional evidence, plainiffs cannot prove Count I. Consequently, judgment in favor of the defendants on Count I is proper.

B.

Count III alleges that defendant breached their duty of care as reasonable and prudent oil producer as required under Michigan law. *Michigan-Wisconsin Pipeline Co. v. Michigan National Bank,* 118 Mich. App. 74 1984). The defendants argued and the district

court found that plaintiff was collaterally estopped from litigating this claim by a series of Michigan state administrative and judicial decisions involving the same parties as *Wronski I.* The decisions stem from another lawsuit filed by the plaintiffs in *Wronski I*, the Koziaras and the Wronskis.

In 1975, the Wronski and the Koziaras filed this second lawsuit against Sun Oil, seeking review of a unitization order of the oil field. Orders were entered by the Supervisor of Wells approving the unitization plan for Sun Oil, allowing Sun Oil to manage the Columbus III field. After the state trial court denied a petition for review by the plaintiffs, the Michigan Court of Appeals remanded to an ALJ for a more detailed hearing and decision. *Wronski v. Sun Oil Co.*, 108 Mich. App. 178 (1981)("*Wronski II*). Administrative Law Judge William Fulkerson issued a Proposal for Decision on may 25, 1988 in favor of Sun Oil which was affirmed by the Supervisor of

Wells and the Michigan state courts. *Koziara v. Sun Oil Co.*, (Mich. Dep't. Nat. Resources may 25, 1988)(Fulkerson, ALJ)("Fulkerson Proposal") *aff'd by* Order of the Supervisor of Wells, *Koziara v. Sun Oil Co.*, No. (A) 1-5-73 REMAND (Mich. Dep't Nat. Resources March 22, 1989)("Order of the Supervisor"), *aff'd sub nom. Wronski v. Sun Exploration and Prod. Co.*, No. 79-22915-AA (Ingham Cir. Ct. June 12, 1991)(Stell, J.)

Count **III** specifically alleges that the defendants incorrectly interpreted geological and reservoir data, failed to represent plaintiffs' interests adequately before the michigan Department of Natural Resources at the 1974 unitization hearings, under-reported oil and gas reserves, sabotaged a well ("the 6-3 well") with cement, and persuaded geologists and other witnesses to give false testimony at the unitization hearing. On summary judgment, plaintiffs offered the affidavit and report of Dr. Joshi, a petroleum engineer, who concluded after reviewing all of the data surrounding the unitization process, that defendants' actions "can in no way be stated to [be] at a level of a prudent

operator." (J.A. at 65). Plaintiffs argue that Dr. Joshi's report and opinions create genuine issues of material fact which make summary judgment improper.

The district court found that plaintiff were collaterally estopped by the Fulkerson Proposal, the Order of the Supervisor and *Wronski II* from raising these claims. The court found that these decisions, primarily the Fulkerson Proposal, addressed all claims raised by plaintiffs in Count **III**, thereby collaterally estopping plaintiffs from relitigating them in the instant case. *Dietrich,* 784 F. Supp. at 388-89.

Defensive collateral estoppel applies to administrative determinations where a method of appeal is provided and the decision is final in the absence of an appeal. *Nummer v. Dep't. of Treasury,* 200 Mich. App. 695, 698 (1993). In this case, the Fulkerson Proposal comports with these procedural requirements: a method of appeal was provided through the Supervisor of Wells and the Michigan courts. Such appeal was taken, and the ALF's decision was affirmed by the state courts. The

Fulkerson Proposal is therefore preclusive as long as the other requirements of collateral estoppel are met.

As explained above in Part II.A. of this opinion, collateral estoppel may only be asserted if mutuality between the parties is established. Mutuality involves a determination of whether the litigants were parties or privy to a party in the former action. Sun Oil and its predecessors were parties to the administrative proceedings and *Wronski II*, but the plaintiff, the Dietrichs, were not. However, the Dietrichs were given notice of and the opportunity to formally participate in the administrative proceedings, attended all of the hearings (Edgar Dietrich was a lawyer for the plaintiffs), and actually participated through Dietrich in the hearings. The Dietrichs' interests were identical to the interests of the named plaintiffs, and the Dietrichs had ample opportunity through Edgar Dietrich's participation to assert and protect those interests. Although mutuality may not be strictly

fulfilled here, Michigan allows a more liberal use of defensive estopped in cases such as this, where the standards under which the litigation will take place are identical and where the parties have had their interests heard and protected in the first litigation. *See, e.g., Alterman v. Provizer,* 195 Mich., App. 422, 425 (1992). We therefore, find that the Fulkerson Proposal is preclusive in this action.

We agree with the district court that the Fulkerson Proposal addressed and decided all of the claims made by the plaintiffs in Count III. First, plaintiffs assert that the defendants misinterpreted geological and reservoir date during the unitization process. The Fulkerson Proposal found to the contrary. It found the gas/oil ratio tests reliable, the production figures proper, the use of porosity acre feet determinations proper; the core analysis a proper method to determine porosity feet; the gas/oil contact and average porosity determinations accurate; and the net oil pay column reasonable. (Fulkerson Proposal at 7-16). Second, plaintiffs assert that defendants failed to represent their interests adequately at the 1974

unitization proceedings. The Proposal found that Sun Oil reasonably construed the data and fairly and equitably determined the participation factors and formulas, the primary issue at the unitization hearings. The Proposal also found that Sun Oil had acted in a completely professional manner throughout the hearings. (Proposal at 21-23A). Third, plaintiffs assert that Sun Oil under-reported oil and gas reserves. To the contrary, the Proposal found that a fair and equitable representation of the oil and gas reserves had been provided by Sun Oil. (Proposal at 20). Fourth, plaintiffs assert that Sun Oil had sabotaged wells with cement. The Proposal found that the wells had not been sabotaged with cement, but rather had been treated with standard materials used in "lost circulation zones." The ALJ found that the scientific data indicated that the materials could not have been cement, and that plaintiff assertion was not credible, given Sun Oil's interest in the wells. Fifth, plaintiffs assert that defendants withheld information on a well (the "6-3 well"). Again, the Fulkerson Proposal states that "Every aspect of the 6-3 well was examined in

great detail". It also notes that plaintiffs seem to be asserting that the information was withheld during the unitization process, yet the 6-3 well did not even exist at the time of unitization. (Proposal at 11). Finally, plaintiffs assert that defendants convinced expert witnesses adverse to the plaintiffs to lie at the unitization hearings. The ALJ disagreed, finding that the defendant approached the unitization process in a totally professional manner. (Proposal at 23A).

Given that all aspects of Count **III** were carefully addressed and conclusively determined by the Fulkerson Proposal, plaintiffs are collaterally estopped from litigating the claims in Count **III**, and summary judgment in favor of the defendants is proper.

C.

In Count IV, plaintiffs allege that defendants' misrepresentation of geological and reservoir data to the Michigan Department of Natural Resources induced plaintiffs and/or their predecessors to sign the 1974 unitization plan, thereby denying them their fair share of the unitization production. In effect, plaintiffs rely on statements and conclusions in Dr. Joshi's

affidavit to create material issues of fact. The district court found this claim collaterally estopped by the Fulkerson Proposal and granted summary judgment. *Dietrich,* 784 F. Supp. at 389.

As in Count III, plaintiffs are collaterally estopped by the Fulkerson Proposal. The ALJ resolved in favor of the defendants all contentions regarding the fairness and validity of the unitization proceeding and defendant's involvement in the process. Therefore, whether or not Dr. Joshi agreed with the ALJ's conclusions, plaintiffs cannot challenge them in this proceeding. Summary judgment in favor of the defendants on Count IV is proper.

III.

After the district court disposed of the first four counts on summary judgement, Count V remained to be tried. Count V alleges that between November, 1984 and March, 1985, defendants produced an additional 881,071 barrels of oil from the field that had not been reported previously, and plaintiffs and other owners were not paid royalties on this oil In April, 1992, the court set the trial date for July 2,

1992, and issued the Final Pretrial Order. The Order, drafted and approved by the plaintiffs, directed that all motions in limine be filed at least one week prior to trial. The Order also clarified the issue of fact to the litigated: "Did Defendants remove oil from the Columbus III field *between November, 1984 and March, 1985,* which was not properly accounted for?"

On July 1, 1992, the day before trial, plaintiffs filed two motions in limine. Both were denied as untimely and on the merits by the court. The next day, the first day of trial, plaintiffs conceded that without successful motions in limine, they were unable to factually prove Count V. On that basis, the district court granted defendants' motion for judgment as a matter of law on Count V and dismissed the case. Plaintiffs argue on appeal that the district court erred in denying their two motions in limine, and that judgment on Count V is premised on these erroneous rulings. In Parts A and B below, we address the court's decisions on the motions, and in Part C we address the district court's judgment as a matter of low on Count V.

A.

The first of plaintiffs' motions was a request to clarify or amend the Final Pretrial Order ("the Order") to allow proof regarding production of oil by defendants outside of time period specified in Count V and in the Order. Specifically, plaintiffs requested that they be allowed to admit proof going back to the mid-1970's, although the complaint alleged over-production only between November, 1984 and march, 1985. The district court denied this motion as untimely since it was not filed within the time limits set by the Order. On the merits, the court found that plaintiffs could only have intended this motion as a surprise or delay tactic. The action had been pending for nearly five and one-half years, and the court found it entirely unreasonable to expect the defendants to defend what would essentially be a new claim raised on the day before trial. On appeal, plaintiffs argue that justice required the court to amend or clarify the Order.

We disagree with the plaintiffs and affirm the district court. First, the motion was untimely,

especially in light of the extreme nature of the request. Second, the plaintiffs agreed to and signed the Order; thus, there is no basis upon which to argue at trial that it was not clear, that it required amendment, that it trapped them into a situation of being unable to prove their claim, or that the plaintiffs in good faith court have believed they would freely be allowed to amended the Order. The district court did not abuse its discretion in refusing to allow the plaintiff to raise an essentially new claim one day before trial. We affirm the denial of this motion in limine.

B.

The second motion requested introduction of the *Wronski I* court of appeals and trial court opinions for purposes on impeachment and absence of mistake. Plaintiffs argued that the decisions established that the defendants had illegally drained oil in the early 1970's, and therefore would show that they knew they were against illegally producing oil during the time period in question. The district court denied the motion as untimely. It also addressed the merits of the motion, ruling that in effect this was a motion for

reconsideration because it had already limited the use of *Wronski I* to issues not involved in Count V. *See Dietrich v. Sun Exploration and Prod. Co., 784 F. Supp. 383* (E.D. Mich. 1992). Finally, the court found that the *Wronski I* decisions factually were limited to the issued not relevant to Count V. On those bases, the district court denied the motion in limine. On appeal, plaintiffs argue that this ruling was error.

We agree with the district court's denial of this motion. First, the motion is untimely. It would be unreasonable to expect the defendants to defend the claim with only a one-day notice of the change in expected proof after relying on the court's previous rulings to prepare for trial. Second, the district court ruled on this issue in *Dietrich*, 784 F. Supp. at 387, stating that the use of *Wronski I* was strictly limited to the time and property interest question at issue in Count I. Finally, the time frames involved in *Wronski I* and Count V are completely different, and based on the first motion discussed above, the court had determined that the proof would be strictly limited to

the time period at issue in Count V. In sum, we do not believe that it was an abuse of the court's discretion to limit the proof in this regard and therefore affirm the district court's denial of this motion in limine.

C.

Upon the district court's denial of plaintiffs' motion to clarify or amend the pretrial order, plaintiffs requested an adjournment, admitting that they were unprepared to try the case without the granting of the motion. When the district court denied the motion to adjourn, plaintiffs admitted they were unable to factually substantiate Count V. On that basis, the district court granted defendants' motion for judgment as a matter of law.

Plaintiffs' admission of being unable to prove the claim together with the correct rulings of the district court on plaintiffs' last-minute motions in

limine wholly support the district court's judgment. We therefore affirm the judgment as a matter of law in favor of defendants on Count V.

IV.

The district court imposed two sanctions against plaintiffs during this litigation. In 1991, prior to the disposition of the first four county on summary judgment, the district court imposed approximately $13,000 in sanctions for abusive litigation practices. The second sanction, imposed under Rule 11 against the plaintiffs and plaintiffs' counsel, was ordered by the court after the entire case was dismissed for pursuit of a factually unsubstantiated claim (Count V). Plaintiffs appeal both sanctions, and we address them below.

A.

After the filing of this lawsuit in 1987, discovery proceeded over the next two years. In 1989, defendants filed a motion to dismiss under Fed.R.Civ.P. 37 for failure to comply with discovery, under Rule 16 for failure to comply with a court order and under Rule 41 for failure to prosecute.

Defendants also requested costs and reasonable attorneys fees. The court referred the motion to a Magistrate, who held two hearings on the matter and issue a detailed, comprehensive Report and Recommendation ("R&R")(J.A. at 146). The district court accepted the R&R, which recommended the imposition of monetary sanctions short of dismissal for abusive litigation practices. Specifically, the court ordered that the plaintiffs pay $12,973.35 for reasonable attorney fees and other reasonable expenses incurred by defendants as a result of plaintiffs' neglect and misconduct during discovery.

On appeal, plaintiffs contend that the district court erred in accepting the R&R because the court's reasons for imposing the sanctions were beyond their control. Plaintiffs also argue that the district court had no authority to impose these sanctions. As explained below, the sanctions imposed were well within the authority and reasonable discretion of the district court and enjoy ample support in the record.

Rules 37(b)(2) and 37(d) of the Federal Rules of Civil Procedure provide authority to the district courts

to impose sanctions, including monetary sanctions, for unjustified noncompliance with discovery orders or rules. These orders need not be in writing to be the basis for discovery sanctions. *See, e.g., Penthouse Int's Lts.a v. Playboy Enterprise Inc.*, 663 F.2d 371, 386-88 (2d Cir. 1981). The court also has broad, well-recognized inherent authority to protect the administration of trails by levying sanctions in response to abusive litigation practices. *Id.* at 386 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)); *see also Link v. Wabach R.R. Co.*, 370 U.S. 626 (1962). Consequently, the district court in the instant case clearly had the authority to impose these sanctions.

The record also supports the decision to impose sanctions. The R&R detailed plaintiffs' repeated failures t comply with discovery orders of the court, failures to answer interrogatories, repeated requests for extensions for responding to discovery requests, failure to appear at scheduled court conferences, failure to produce their expert witness for a deposition by the deadline set by the court, and at least two requests that

the trial date by changed (the action had been set for trial 13 times). In fact, in a later order of the district court on another sanction issue, the court described plaintiffs' conduct as "inordinate and unjustifiable interferences with and obstruction of the exercise of [defendants'] discovery rights." (J.A. at 367-68). These examples illustrate the extreme and ongoing nature of abuses by plaintiffs, and support the court's decision to impose sanctions. We find no error in the imposition of sanctions for abuse of discovery, and therefore affirm.

B.

On August 7, 1992, one month after the district court dismissed the case, defendants filed a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, alleging that plaintiffs pursued Count V will full knowledge that they were unable to prove the claim. After entertaining plaintiffs' response to the motion, the court imposed Rule 11 sanctions on the grounds that the plaintiff had pursued a factually unsubstantiated claim. The court ordered the defendants to supply affidavits outline reasonable costs

and fees incurred as a result of plaintiffs' misconduct. On February 26, 1993, upon review of the materials submitted and review of plaintiffs' objection, the court ordered that "plaintiffs and plaintiffs' counsel shall pay to defendants in equal share the sum of $19,735.00...."

Plaintiffs argue on appeal that the court cannot impose Rule 11 sanctions when the complaint was originally filed in state court and later removed to federal court. This argument is without merit. In *Mann v. G&G Mfg. Inc.*, 900 F.2d 953 (6th Cir.), cert. denied sub nom., Sloan v. G&G Mfg. Inc., 498 U.S. 959 (1900), the court held that after a complaint is filed, attorneys have a "continuing responsibility to review their pleadings, and if necessary, to modify them to conform with Rule 11". Id. at 959. "Failure to do so permits the district court, within its discretion, to impose sanctions against the offending litigant or attorney when a reasonable inquiry would have disclosed that the complaint was either lacking in factual support or unwarranted by existing law." Id. (citing *Herron vs. Jupiter Transportation Co.*, 858

F.2d 332, 336 (6th Cir. 1988)). Plaintiffs filed an emended complaint in federal court, and were under the continuing responsibility explained in *Mann* to review and modify their pleadings in accordance with Rule 11.

Plaintiffs next argue that the district court abused its discretion when it found plaintiffs' actions objectively unreasonable and deserving of Rule 11 sanctions. They argue that only a technical defect in Count V prohibited them from prosecuting the claim, and that they objectively and in good faith believed that they would be allowed to amend the pleading on the day before trial. Plaintiffs produce no evidence that they did not know of or should not have been required to discover the problem in the complaint sooner. In fact, the record clearly reflects that they did know of the time discrepancies during the final

pretrial conference three months before trial. At the conference, the court refused to allow plaintiffs to alter the substance of Count V, specifically stating in the Final Pretrial Order that the dates would be restricted to those in the complaint. As such, this was not a "technical defect" of which plaintiffs were unaware. Plaintiffs have established absolutely no abuse of discretion on the part of the district court in imposing these sanctions. In fact, the record reflects that this is exactly the type of case for which Rule 11 sanctions are appropriate.

The court assessed $19,735 in Rule 11 sanctions based on plaintiffs conduct from February, 1992 (when all counts except Count V were dismissed) until July 2, 1992 (the day of trial). Plaintiffs argue on appeal that the amount of sanctions should be based only on the costs incurred immediately before trial or just for the first day of trial.

The district court found that Count V was factually unsubstantiated and that plaintiffs had pursued the claim despite knowledge of this problem. Thus,a defendants incurred unnecessary costs and fees starting

in February, 1992, when they were preparing solely for trial on Count V. Further, the court inquired extensively into the basis and reasonableness of any sanctions, twice striking the affidavits of defendants and ordering to submit more specific statements of their incurred costs.a The court allowed plaintiffs ample opportunity to file objections to al submissions by the defendants. In sum, the record amply supports the district court's decision; it did not abuse its discretion in setting the amount of sanctions.

The Rule 11 sanctions were entered against plaintiffs and plaintiffs' counsel in equal amounts. Plaintiffs' counsel argues that the district court erred in imposing sanctions against him because the defendants did not request such a sanction and he did not have notice to oppose the sanctions against himself. Defendants assert on appeal that we are without jurisdiction to review counsel's argument because counsel was not named in the notice of appeal as a party intending to appeal.

The notice of appeal states: "Notice is hereby given that, EDGAR J. DIETRICH and THERESITA

DIETRICH, Plaintiffs, in the above entitled matter hereby appeal...." The caption refers only to the plaintiffs; nowhere does it refer to counsel as a plaintiff in the case or on appeal. Failure to name a party in the notice of appeal, as required by F.R.A.P. 3(c), "constitutes a failure of that party to appeal." *Torres v. Oakland Scavenger co.*, 487 U.S. 312, 314 (1988). The Supreme Court in *Torres* enunciated a strict, unyielding interpretation of Rule 3(c) which stripped the lower courts of discretion to waive technical requirements. Under *Torres*, it is clear that we would not have jurisdiction to review counsel's appeal.

Since *Torres*, Rule 3(c) has been amended to prevent appeals from being destroyed by some technical defects. For example, the Rule states that an appeal should not be dismissed "for failure to name [in the notice] a party whose intent to appeal is otherwise clear from the notice." Thus, when a notice of appeal specifies "all plaintiffs" or "the plaintiffs A,B, et al.," the appeal should not be dismissed since it is objectively clear how the parties are that intend to

appeal. In this case, however, it is not objectively clear that counsel intended to appeal. The notice specifically names only the two plaintiffs, the caption nowhere refers to counsel, and counsel is described below the caption only as "Attorney for Plaintiffs". This notice contains no objective indication, or even an ambiguity, that we may interpret as including plaintiff's counsel. Under Rule 3(c) and Torres, we are without jurisdiction to entertain this portion of the appeal. *See also F.T.C. v. Amy Travel Services, Inc.*, 875 F.2d 564 (7th Cir.), *cert. denied, 493 U.S. 954 (1989).*

V.

In sum, summary judgment in favor of the defendants is proper on Counts ***I,III and IV.*** *The district court also correctly granted judgment as a matter of law in favor of the defendants on Count* ***V.*** *Finally, we find no error in the court's imposition of sanctions for abusive litigation practices and under Rule 11. The district court's judgment is* ***AFFIRMED*** *in all respects.*of

UNITED STATES DISTRICT COURT R.2
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

Case No. 87-70451
Hon. Paul V. Gadola
Entered Feb. 26, 1993

ORDER DIRECTING PLAINTIFFS TO PAY SANTIONS TO DEFENDANTS

On August 28, 1992, this court entered an order granting defendants' motion for sanctions. On February 4, 1993, defendants submitted detailed documentation, in the form of affidavits, of the costs incurred by defendants in connection with the defense against Count V of this lawsuit. On February 17, 1993, plaintiffs filed objections to defendants' affidavits.

The court, having reviewed defendants' affidavits

and plaintiffs' objections thereto, finds that defendants incurred costs totalling $19,735.00; that is, $14,134.50 in legal fees and $831.85 in costs in connection with the legal representation of outside-counsel, Terence Lynum, and $4,768.65 in in-house counsel and personnel costs.

ORDER

Therefore, it is hereby ORDERED that plaintiffs and plaintiffs' counsel shall pay to defendants in equal share the sum of $19,735.00 by no later than thirty (30) days from the date of this order.

SO ORDERED.

Dated: 2/26/93

PAUL V. GADOLA
United State District Judge

UNITED STATES DISTRICT COURT **R.3**
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

Case No. 87-70451
Hon. Paul V. Gadola
Entered Aug. 28, 1993

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

On July 8, 1992, this court entered an order dismissing the last remaining claim contained in the amended complaint. This order was based on plaintiffs' counsel's admission that plaintiffs would be unable to present proofs essential to their case. On August 7, 1992, defendants filed the instant motion for sanctions pursuant to Fed. R. Civ. P. 11. Plaintiffs filed a

response August 24, 1992. Oral argument was dispensed with pursuant to LR 7.1(e)(2) (E.D. Mich. Jan. 1, 1992).

BACKGROUND FACTS AND PROCEDURE

Plaintiffs filed their original complaint in this matter in Wayne County Circuit Court. The matter was removed to federal court February 9, 1987. An amended complaint was filed April 11, 1988. In their five-count, amended complaint, plaintiffs alleged that defendants illegally drained 36.417.5 barrels of oil from land in which they had an interest (Count I); that defendants illegally overproduced oil from the land, thereby breaching an alleged fiduciary duty owed to plaintiffs (Count II); that defendants negligently or intentionally breached their duty to plaintiffs by failing to use the care and skill of an ordinary and prudent oil producer, including underreporting oil reserves, sabotaging the well by pouring cement into it and persuading geologists and other witnesses to give false testimony (Count III); that defendants fraudulently induced plaintiffs or their

predecessors to sign the unitization agreement (Count IV); and that defendants failed to compensate plaintiffs for 881.071 barrels of oil allegedly produced by defendants (Count V).

In his November 1, 1988 order, United States District Judge Patrick J. Duggan dismissed Count II of the amended complaint. By a January 10, 1989 administrative order, this case was reassigned to this court. Subsequently, this court granted defendants summary judgment as to Counts I, II and IV February 10, 1992. Thus, the only claim remaining in the case was count V.

The history of this case would not be complete without an overview of the extreme litigiousness and delay that has occurred because of the actions of plaintiffs and plaintiffs' counsel. Plaintiffs have twice filed motions to extend discovery (March 20, 1989, and May 4, 1989). Plaintiffs have also twice filed motions to change the trial date (July 28, 1989, and November

15, 1989). Further, this court has sanctioned plaintiffs for the actions of their attorney. Plaintiffs' counsel delayed and obstructed discovery of plaintiffs' expert Dr. M.Y. Joshi by purposefully failing to produce Dr. Joshi for his deposition. Plaintiffs' counsel also delayed his responses to defendants' interrogatories. Further, plaintiffs' counsel has given defendants and this court assurances that future discovery matters would be complied within a timely fashion. These assurances were not fulfilled.

Defendants, after inordinate and unjustifiable interferences with and obstruction of the exercise of their discovery rights, eventually filed a motion to dismiss on the basis of such obstructions and procrastination. Magistrate Judge Steven D. Pepe, in his report and recommendation of May 24, 1991, declined to recommend the extreme and ultimate relief of dismissal of plaintiffs' case, but did recommend that plaintiffs pay sanctions to defendants in the amount of $12,9073.35.

The report and recommendation is replete with detailed presentations of the conduct which led to the recommendation of such a substantial sanction.

On August 1, 1991, this court accepted the magistrate judge's report and recommendation that plaintiffs be sanctioned in the amount of $12,9073.35, reflecting defendants' attorneyhs' and experts' fees expended due to plaintiffs' counsel's delays. This amount was to be paid no later than September 1, 1991. Failure to pay in a timely fashion would result in at least plaintiffs' inability to use Dr. Joshi as an expert. Further, failure to timely pay this amount might also have resulted in dismissal of plaintiffs' claims. Plaintiffs failed to pay this amount by September 1, 1991. Nevertheless, at the request of plaintiffs' counsel, this court again showed leniency and ordered that time for payment of the sanctions be extended and that payment be made not later than May 1, 1992.

This matter has been set for trial thirteen times.

Judge Duggan had set trial for March 1988, July 1988, November 1988, and March 1989. This court has set trial dates of June 1989, September 1989, December 1989, March 1991, May 1991, February 1992, March 1992, April 1992, and July 1992. Further, plaintiffs have three times asked for an extension of time to file the joint final pretrial statement (motions dated July 28, 1989; November 15, 1989; and April 6, 1992). The latest motion filed was due to plaintiffs' counsel being on vacation the two weeks prior to the due date. This court takes notice, however, that plaintiffs' counsel was given ample notice of the pending trial date and the due date of the final pretrial statement. Additionally, it was not until after the final pretrial statement was due that plaintiffs' counsel decided to file a motion to extend the time for filing.

Finally, this matter was set for trial July 2, 1992, on the sole remaining issue of whether defendants produced 881.071 barrels of oil from the Columbus III

oil field without compensating plaintiffs (Count V). On July 1, 1992, plaintiffs filed two "motions in limine." (1.fn) The first motion was entitled "Motion in Limine to Clarify and/or Amend Final Pretrial Order." and the second motion was entitled "Motion in Limine Regarding Introduction of the Wronski and Streeter Opinions for the Limited Purpose of Impeachment and Absence of Mistake." In its July 8, 1992 order, this court denied plaintiffs' motions in limine because both were untimely filed. Further, this court stated that, as to plaintiffs' first motion, plaintiffs could not alter the final pretrial order, signed by all parties' counsel and issued by this court, at such a late date. Finally, as to plaintiffs' second motion, the issue had already been decided; and the opinions sought to be introduced were not germane or relevant to the remaining issues.

(1.fn) Technically, these motions, although entitled motions in limine, were motions to expend the proofs rather than limit the proofs. These motions were essentially a motion for reconsideration and a motion to

amend the pretrial order.

Additionally, after this court informed the parties of its preliminary decision concerning plaintiffs' two motions in limine, plaintiffs formally moved this court to adjourn trial because plaintiffs' counsel was unprepared to offer proofs that the 881.071 barrels of oil at issue were produced between November 1984 and March 1985. Trial in this matter had been set for July. Counsel had been on notice of this trial term since April 1992. Trial briefs had been filed, a jury had been chosen, and the court's trial docket had been cleared so that the parties in this case could finally resolve their dispute. Because plaintiffs' request for an adjournment on the first day of trial based upon matters that should have been resolved months if not years prior was patently unfair not only to this court and to the jurors selected, but also to opposing counsel, this court denied plaintiffs' motion to adjourn.

Finally, defendants formally moved this court for

a judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P 56(b). Defendants point to plaintiffs' admission that they could not prove that the 881.071 barrels of oil in dispute were produced between November 1984 and March 1985, a crucial and necessary part of plaintiffs' claim. Plaintiffs did not dispute that, at that point in the trial, they could not prove those necessary elements of their claim; and they informed the court that they could present no proof whatsoever to establish that defendants produced any oil between November 1984 and March 1985 for which plaintiffs were not compensated. Because of plaintiffs' admission, this court granted defendants' motion for judgment as a matter of law or, in the alternative, for summary judgment.

ANALYSIS

Plaintiffs first assert that, because they have filed a notice of appeal, this court is without jurisdiction to hear defendants' motion for sanctions. This contention is without merit. "(A) district court retains jurisdiction to entertain a motion for Rule 11 sanctions even after the filing of a notice of appeal." Val-Land Farms, Inc. v. Third Nat'l Bank in Knoxville, 937 F.2d 1110, 1117 (6th Cir. 1991) (citing Regional Refuse Sys. v Inland Reclamation Co., 842 F.2d 150, 156 (6th Cir. 1988)). Therefore, this court will decide the instant motion.

Second, plaintiffs suggest that Rule 11 does not apply to the instant case because at the time the amended complaint was filed, plaintiffs believed they had a viable claim. However, this court reads Rule 11 to create a continuing obligation on the part of counsel to reassess each pleading, motion or paper filed with this court in light of failed or successful discovery.(2.fn) Once plaintiffs' counsel realized that he could not prove his

claim as stated in the amended complaint and the pre-trial statement, counsel should have dismissed his clients' claim. Because he did not do so, plaintiffs' counsel shall be sanctioned for pursuing a factually unsubstantiated claim. See Lawrence v. Hinton, 937 F.2d 603 (4th Cir. 1991) (unpublished disosition); Propst v. Greene, 123 F.R.D. 535, 542-43 (W.D.N.C. 1988).

Third, plaintiffs argue that this court cannot impose sanctions because it is relying upon facts which plaintiffs believe are in error. However, this argument _____

(2.fn) The United States Court of Appeals for the Sixth Circuit has ruled on this issue several times. However, the panels of the Sixth Circuit have reached varying and oftern contrary results. Compare Roy v. United States Fidelity & Guar. Co., 922 F2d 841 (6th Cir. 1991) (unpublished decision) (no continuing obligation imposed by Rule 11), and Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989) (same) with Mann v. G & G Mfg., 900 F.2d 953, 959 (6th Cir. 1990) (continuing obligation imposed by Rule 11), cert. denied sub nom.. Sloan v G & G Mfg., 111 S. Ct. 387 (1990), and Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988) (same). See also Cincinnati Newspaper Pressmen Union No. 30N v. Gannett Satellite Info. Network, Inc., 737 F. Supp. 473, 476 (s.D. Ohio 1990) (continuing

obligation imposed by Rule 11); Yancey v. Carroll County, Ky., 674 F. Supp. 572, 577 (E.D. Ky, 1987) (same), aff'd, 884 F.2d 581 (6th Cir. 1989); Advo Sys. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986) (same). Because the latest published opinion from the Sixth Circuit has stated that Rule 11 imposed upon attorneys a continuing obligation to reassess their pleadings, Mann, 900 F.2d at 959, this court will thus impose such a duty upon plaintiffs' counsel.

is an attempt to appeal this court's findings of fact and conclusions of law. That task is better left to the court of appeals.

Finally, this court shall not limit sanctions to those possible under Rule 11 but shall also impose costs and fees pursuant to this court's inherent power to sanction for bad-faith conduct. See Chambers v. Nasco, Inc., 501 U.S. ----. 115 L.Ed.2d 27, 47-48 (1991).

ORDER

Therefore, it is hereby ORDERED that defenants' motion to impose sanctions is GRANTED and that reasonable costs and attorneys' fees shall be imposed equally upon plaintiffs and plaintiffs' counsel.

It is further ORDERED that defendants supply the

court with an affidavit outlining all reasonable costs and attorneys' fees generated by plaintiffs counsel's failure to withdraw Count V.

SO ORDERED.

Dated: 8/28/92

PAUL V. GADOLA
United States District Judge

R.4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH.

Plaintiffs, CASE NO.: 87-70451
HONORABLE PAUL V. GADOLA

VS.

ENTERED: JULY 8, 1992

SUN EXPLORATION AND PRODUCTION
COMPANY and SUN OPERATING LIMITED
PARTNERSHIP.

Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFFS' MOTIONS IN LIMI

DENYING PLAINTIFFS' MOTION TO ADJOURN, AND GRANTIN

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LA

Plaintiffs filed their original complaint in this matter in Wayne county Circuit Court. The matter was removed to federal court February 9, 1987. An amended complaint was filed April 11, 1988. In their five-count amended complaint, plaintiffs alleged that defendants illegally drained 36, 417.5 barrels of oil from land in which they had an interest (Count I): that defendants

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illegally overpronounced oil from the land, thereby breaching an alleged fiduciary duty owned to plaintiffs (Count II): that defendants negligently or intentionally breached their duty to plaintiffs by failing to use the care and skill or an ordinary and prudent oil producer, including underreporting oil reserves, sabotaging the well by pouring cement into it and persuading geologists and other witnesses to give false testimony (Count III): That defendants fraudulently induced plaintiffs of their predecessors to sign the unitization agreement (Count IV): and that defendants failed to compensate plaintiff for 881,071 barrels of oil allegedly produced by defendants (Count V).

In his November 1, 1988 order, United States District Judge Patrick J. Duggan dismissed Count II of the amended complaint. by a January 10, 1989 administrative order, this case was reassigned to this court. Subsequently, this court granted defendants summary judgment as to County I, III and IV February 10, 1992. The only claim remaining in the case is Count V.

The history of this case would not be complete

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without an overview of the extreme litigiousness and delay that has occurred because of the actions of plaintiffs and plaintiffs counsel. Plaintiffs have twice filed motions to extend discovery (March 20, 1989 and May 4, 1989). Plaintiffs have also twice filed motions to change the trial date (July 28, 1989, and November 15, 1989). Further, this court has sanctioned plaintiffs for the actions of their attorney. Plaintiffs counsel delayed and obstructed discovery of plaintiffs expert Dr. M.Y. Joshi by purposefully failing to produce Dr. Joshi for his deposition. Plaintiffs counsel also delayed his responses to defendants and this court assurances that future discovery matters would be complied with in a timely fashion. These assurances were not fulfilled.

Defendants, after inordinate and unjustifiable interferences with and obstruction of the exercise of their discovery rights, eventually filed a motion to dismiss on the basis of such obstructions and procrastination. Magistrate Judge Steven D. Pepe, in his report and recommendation of May 24, 1991, declined to recommend the extreme and ultimate relief of dismissal of plaintiffs case, but did recommend that plaintiffs pay

sanctions to defendant in the amount of $12,973.35. The report and recommendation is replete with detailed presentations of the conduct which led to the recommendation of such a substantial sanction.

On August 1, 1991, this court accepted the magistrate judge's report and recommendation that plaintiffs be sanctioned int the amount of $12,973.35, reflecting defendants attorneys and experts fees expended due to plaintiffs counsel's delays. This amount was to be paid no later than September 1, 1991. Failure to pay in a timely fashion would result in at least plaintiffs' inability to use Dr. Joshi as an expert. Further, failure to timely pay this amount might also have resulted in dismissal of plaintiffs claims. Plaintiffs failed to pay this amount by September 1, 1991. Nevertheless, at the request of plaintiffs counsel, this court again showed leniency, and ordered that time for payment of the sanctions be extended, and that payment be made not later than May 1, 1992.

This matter has been set for trial thirteen times. Judge Duggan had set trial for March 1988, July 1988, November 1988, and March 1989. This court has set

trial dates of June 1989, September 1989, December 1989, March 1991, May 1991, February 1992, March 1992, April 1992 and July 1992. Further, plaintiffs have three times asked for an extension of time to file the joint final pretrial statement (motions dated July 28, 1989, November 15, 1989, and April 6, 1992). The latest motion filed was due to plaintiffs counsel being on vacation the two weeks prior to the due date. This court takes notice, however, that plaintiffs counsel was given ample notice of the pending trial date and the due date of the final pretrial statement. Additionally, it was not until after the final pretrial statement was due that plaintiffs counsel decided to file a motion to extend the time for filing.

Finally, this matter was set for trial July 2, 1992, on the sole remaining issue of whether defendants produced 881,071 barrels of oil from the Columbus III oil field without compensating plaintiffs (Count V). On July 1, 1992, Plaintiffs filed two "motions in limine".[1] The first motion was entitled "Motion in Limine to

[1] Technically, these motions, although entitled motions in limine, are in reality mot to expand the proofs rather than limit the proofs. These motions are essentially a motion reconsideration and a motion to amend the pretrial order.

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Clarify and/or Amend Final Pretrial Order" and the second motion was entitled "Motion in Limine Regarding Introduction of the Wronski and Streeter Opinions for the Limited Purpose of Impeachment and Absence of Mistake."

Procedurally, as motions in limine, plaintiffs' motions were denied as untimely. On June 14, 1991, this court issued a "notification of final pretrial conference and trial." In this notification, this court ordered that "[a]11 motions in limine shall be filed and served on opposing counsel four weeks before trial." In a later order dated April 14, 1992, this court relaxed the time limits and ordered that "[a]t least one week prior to beginning of trial term all counsel shall furnish to the court... motions in limine." Under both orders, plaintiffs motions were untimely. Prompt and complete review of motions in limine guarantees a more efficient and streamlined trial. Therefore, failure to follow this court's scheduling orders concerning motions in limine is a sufficient ground to deny plaintiffs motions. Further, it is incredible that plaintiffs and plaintiffs counsel waited until the last moment before trial,

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especially when this case has gone through thirteen different trial dates, to file these motions. Plaintiffs motions, filed on July 1, 1992, at 11:56 am, and delivered to this court later that day, with trial scheduled for 8:30 am on July 2, 1992, deserve and warrant denial on the basis of untimeliness alone. However, because of the importance of these motions, this court will address the merits as well.

In their first motion, plaintiffs asked this court to allow the final pretrial order to be clarified and/or amended. Count V of the amended complaint set forth plaintiffs sole remaining claim:

> 45. Plaintiffs...state that in November of 1984 through March of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field that had not previously been accounted for. That said figures were subsequently removed from the production records after an inquiry was made by Eugene Koziara.
>
> 46. ..... Plaintiffs have never been compensated for their aliquot share of the revenue from the sale of this oil under unitization.

Amended compl. at paras. 45 & 46. From this plaintiffs and defendants fashioned the final pretrial order which stated in relevant part:

Plaintiffs allege that in November of 1984 through March

of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field between November, 1984 and March 1985, for which Plaintiffs were not compensated.

* * *

Issues of fact to be litigated..... Did Defendants remove oil from the Columbus III filed between November , 1984 and march, 1985, which was not properly accounted for?

Final pretrial order at 2 & 4.

The final pretrial order drafted and approved by plaintiffs, counsel

did further state as follows:

Plaintiffs intend to file a Motion to Amend their pleadings to allow for testimony regarding Count V dealing with the time period of June 1974 through March 1985 as it relates to Tracts 1 and 2, along with Tract 6, pertaining to unaccounted-for oil that was produced.

Id. at 3 (emphasis added). With their first motion, which is the possible motion to which plaintiffs counsel referred in the final pretrial order, plaintiffs counsel referred in the final pretrial order, plaintiffs wished to amend the final pretrial order to state that the production of oil by defendants, for which plaintiffs claimed they had not been compensated, need not have occurred between November 1984 and March 1985, and instead may have occurred from June 1974 through March 1985.

Defendants vigorously objected to this motion. Defendant stated that they were prepared to defend against plaintiffs claim that "881,071" barrels of oil were produced in the Columbus III field between November, 1984 and march, 1985." Id. at 2. Defendants stated that, on July 2, 1992, they were not prepared to defend against the much broader claim that the oil was produced at any time prior to March 1985.

The court agreed with defendants that altering the final pretrial order, signed by all parties' counsel and issued by this court, at such a late date would be tantamount to a surprise tactic designed to redefine a claim set in place for over five years. The court read Count V of the amended complaint to say that the oil must have been produced between November 1984 and march 1985. However, the court did recognize an ambiguity which is arguable at best. On the other hand, the final pretrial order was clear and distinct: "Did Defendants remove oil from the Columbus III filed between November, 1984 and March, 1985 ....?" Id. at 4. This statement of plaintiffs' claim can be no clearer.

Further, the tactic of plaintiff in filing their motion on the eve of trial to state an entirely different claim than they had been asserting sine the filing of their amended complaint of April 11, 1988, was reprehensible and unacceptable. Viewing this motion against the backdrop of the history of this case, this court can only surmise that it was intended to either be a surprise tactic or at least a delay tactic. Therefore, this court did not allow plaintiffs' amendment on the morning of trial, with a jury having been selected and ready to hear the case, because it would have worked substantial injustice upon defendants who have adequately prepared for trial over the five years this case had been pending, on the basis that they were defending a claim of oil allegedly taken without compensation between November 1984 and March 1985. This would have presented defendants with the prospect of defending against an entirely different claim, with possibly different defenses, including, as defendants counsel correctly pointed out in oral argument on July 2, 1992, the defense of the statute of limitations.

Second, plaintiffs filed a second motion in limine asking this court to allow the introduction of the

"Wronski"[2] and "Streeter"[3] opinions for the limited purpose of impeachment and absence of mistake. On November 16, 1989, plaintiffs filed a "Motion in Limine Regarding Admissability and Effect of 1974 [sic] Opinion of Judge Streeter and Wronski v. Sun Oil, 89 Mich. App 11 (1979) in the Instant Litigation." In Dietrich vs. Sun Exploration and Prod. co., 784 F. Supp. 383 (E.D. Mich 1992), this court clearly utilized both opinion in the decision but limited the Wronski and Streeter opinions to issues not involved in the current trial. This court again clarified this issue in its April 28, 1992 order addressing plaintiffs November 16, 1989 motion. This court read the instant motion in limine as an attempt to file a belated motion for reconsideration, which will not be allowed.

Further, even though plaintiffs attempted to limit their use of the Wronski and Streeter opinions to impeachment and absence of mistake, these opinions, as discussed in Dietrich, were limited to matters not germane to the sole remaining issue set for trial. The parties, transactions, remedies and facts in the Wronski

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[2] Wronski v. Sun Oil Co., 89 Mich. App. 11 (1979), leave denied, 407 Mich. 863 (19

[3] Wronski v. Sun Oil, Nos. 101-7 & 103-7 (St. Clair Cir. Ct. Dec. 21, 1976).

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and Streeter decisions were not the same as in the instant case. Therefore, the court also denied plaintiffs' second motion in limine.

Additionally, after this court informed the parties of its preliminary decision concerning plaintiffs' two motions in limine, plaintiffs formally moved this court to adjourn trial because plaintiffs' counsel was unprepared to offer proofs that the 881,071 barrels of oil at issue were produced between November, 1984 and March, 1985. Trial in this matter had been set for July. Counsel had been on notice of this trial term since April, 1992. Last minute tactical maneuvers to avoid litigation are not looked upon favorably by this court and will not be tolerated. Trial briefs had been filed, a jury had been chosen, and the court's trial docket had been cleared so that the parties in this case could finally resolve their dispute. To ask for an adjournment on the first day of trial based upon matters that could and should have been resolved months if not years prior is patently unfair not only to this court and to the jurors selected, but also to opposing counsel. Therefore, this court denied plaintiffs' motion to adjourn.

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Finally, defendants formally moved this court for a judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(b). Defendants point to plaintiffs' admission that they could not prove that the 881,071 barrels of oil in dispute were produced between November, 1984 and March, 1985, a crucial and necessary part of plaintiffs' claim. Plaintiffs did not dispute that, at this point in the trial, they could not prove these necessary elements of their claim, and informed the court that they could present no proof whatsoever to establish that defendants produced any oil between November 1984 and March 1985 for which plaintiffs were not compensated.

Federal Rule of Civil Procedure 50(a) reads in relevant part:

> If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Plaintiffs were heard to admit, and did again admit, that

they could not prove an essential element of their claim. Defendants moved this court for a judgment as a matter of law. Because of plaintiffs' admission, this court granted defendants' motion for judgment as a matter of law or, in the alternative, for summary judgment.

ORDER

Therefore, it is hereby **ORDERED** that plaintiffs July 1, 1992 motions in limine are **DENIED**.

It is further **ORDERED** that plaintiffs' motion to adjourn trial is **DENIED**.

It is further **ORDERED** that defendants' motion for judgment as a matter of law or, in the alternative, summary judgment, is **GRANTED**.

SO ORDERED.

Dated: July 8, 1992

_____
HON. PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT **R.5**
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

Case No. 87-70451
Hon. Paul V. Gadola
Detroit, Michigan
Thursday, July 2, 1992

JURY TRIAL TRANSCRIPT
(PARTIAL; Pgs. 37-50)

BEFORE THE HONORABLE
PAUL V. GADOLA, FEDERAL JUDGE

TRANSCRIPT ORDERED BY:
JACK CHILINGIRIAN

APPEARANCES:

For the Plaintiff:

By: Jack Chilingirian
P.O. Box 319
St. Clair Shores,
MI 48080

For the Defendants:	Lynam & Associates By: Terence V. Lynam P.O. Box 80705 Lansing, MI 48908
Recorded by:	Elnora Williams 133 U.S. Courthouse Detroit, MI 48226
Transcribed by:	Lynn L. Spietz 13810 Courtland Oak Park, MI 48237

THE COURT: We're prepared to proceed this morning. Is it your representation that you cannot -- that your're unable to present any proofs --

MR. CHILINGIRIAN: As an officer of the court, your Honor, I could not prove November '84 forward; I can prove November '94 backwards, and it's --

THE COURT: You -- you -- you concede then that you have no proofs that the Defendant surreptitiously, or otherwise, removed oil from the Columbus III oil field between November 1984 and March 1985?

MR. CHILINGIRIAN: Correct.

THE COURT: Is that correct?

MR. CHILINGIRIAN: That's correct, that's correct.

THE COURT: sO YOU HAVE NO PROOF AVAILABLE TO SUBSTANTIATE YOUR CLAIM?

MR. CHILINGIRIAN: That -- well -- I'm sorry, the way --

THE COURT: Within that period?

MR. CHILINGIRIAN: I understand that. And the way -- and the way the pleadings are crafted, and the way the order is -- now, don't forget I interpret the pleadings differently, I interpret the order differently, I've raised the motion -- I think -- I understand the timeliness issue, all those things. As an officer of the court, your Honir, I'm acknowledging that my client has no proof: '84 to 85, in that period, but we do have proofs, we believe, from '84, because logically and common sense, it would have to be backwards in time. And I think there're substantial documents that have been obtained through discovery. And I think the issue should go forward on that basis, I think.

THE COURT: fAll right. I'll hear from defense counsel then.

MR. LYNAM: Well, thank you, your Honor.

Notwithstanding Mr. Chilingirian's differences with the Court's interpretation of things, the -- the

Defendant is -- is fully in agreement with all that the Court has said.

Moreover, your Honor, I think that in light of the Plaintiffs' admission that they have no proofs to substantiate their claim, I would like to address, if I may, a motion for summary judgment at this time, and dismissal of this matter.

And -- and just very briefly, your Honor, I would like to, in support of that, say that the Defendnts in this case, and the Plaintiffs, are bound by a lease contract. There's no dispute that that contract has been in effect since the early 1970's, and continues in effect today.

In -- it's also undisputed, and the Plaintiffs don't -- don't claim otherwise, that that lease contract was modified by an order of the Supervisor of Wells of the State of Michigan, Department of Natural Resources, on June 30th, 1974, and that the provisions in that were in effect -- to the extent that they affected the share that would be paid to the Plaintiffs.

The lease contract gives the Defendant the right to take possession of the oil that is produced from the leased premises; that also is not in dispute. And it doesn't matter whether we took that oil out of the ground at midnight, and trucked it at one o'clock in the morning; it doesn't matter. We had a right that is undisputed, to take possession of that oil, and to market that oil, and sell it to third persons. That's also undisputed.

The only claim here by the Plaintiffs is that we breached the lease contract by not paying them their fractional share of the proceeds of sale of that product. And under the lease the Plaintiffs only become entitled to receive those when the oil is sold. If we produce these wells into large tanks over a six-month period, and didn't sell any of it, we would not owe the Plaintiffs anything, at that point. It's only when the product is sold, and that's why the Plaintiffs have the burden of proof: That we sold oil that we did not pay them for, because they owned an interest in that oil when we produced and sold

it.

The Plaintiffs have admitted that they have no proofs that we sold the oil to anybody.[8] That we -- they say we can't prove when it was produced, and we can't prove that they sold it to anybody, or who they sold it to, or for how much. They've admitted that, your Honor.

In fact, I think Mr. Chilingirian would acknowledge, and I think he has, that the oil -- the -- the volume of oil that they are claiming was produced between November of 1984 and March of 1985 from this field couldn't even have physically been produced from the field. We couldn't even have taken that much oil into our possession from this field, let alone sell it to somebody and be paid for it, in a way that they claim we have hidden from everyone.

Now, I would like to add one more thing, you Honor. As the Court has noted, this case was filed in January of 1987; it's five and a-half years later. The Plaintiffs have -- have made no attempt to ascertain when

this oil was produced, or to whom it was sold.

If they had -- if they had any such proofs, they certainly have had an opportunity to find -- to do investigate and find them. It's not like Mr. Chilingirian says, well, we haven't had an opportunity here to -- to find out, so we can prove it. He's just admitted that despite five and a-half years to look at the situation, to use the powers of this Court, to discover whatever was necessary to maek their proofs, they haven't done it.

And I think that -- that -- on -- in light of the representations made by counsel, it's very clear that there is absolutely no merit to this claim. And we have claimed from day one, your Honor, and we have made it clear, that what happened here was a clerical error, only. You're talking about a cumulative production figure in a report that nobody claims was relied upon for payment of royalties to anybody. It was an internal production report that was used mainly by technical people: engineers.

It is a clerical error; we have explained that to the Plaintiff. We have brough Miss Snyder here to explain that to the jury, if necessary. And it is just absolutely ludicrous that we should have to go forward in this matter, in light of what the Plaintiff has said here.

MR. CHILINGIRIAN; Just in response to the summary judgment --

THE COURT: I really don't interpret it as a motion for summary judgment. It really would appear to me as a -- as a Rule 50 motion, for a judgment as a matter of law in a jury action. That is, it -- it's really a motion in which there -- the Court is asked to determine that there's no sufficient evidentiary basis for a reasonable jury to find for the Plaintiff, based as I take it, on the Plaintiffs' counse;'s representation that he has no proofs to present to the jury that -- in substantiation of this claim.

MR. CHILINGIRIAN: Remember, your Honor, I want to make sure the record's clear. Again the issue

of the amendment of the pleadings, all of those are p[reserved in my argument. But let me address something.

THE COURT: I understand.

MR. CHILINGIRIAN: I don't admit -- I don't admit -- two things I don't admit. Number one, I don't admit that they didn't do this. I admit that it wasn't during specific period of time that is crafted in these pleadings, and is, at least by way of this Court rule, and the liberal amendments, should be allowed, and should be allowed to be presented.

By way of example, your Honor, if I've got in all this information, and it wound up that it was actually found out that it was seven months earlier. Your Honor could amend the pleadings, could permit amendment to the pleadings to conform to the proofs. And that's why I think it's just patently unfair.

But let me address something. I don't admit that they didn't sell it. The point is, your Honor, 881.000

barrels of oil were not stored. They don't have that kind of capacity near or at the field. It could have been piped out, it could have been trucked out, and the issues of that were in the documents, and in the records that we were going to present.

What this Court again is doing, I think, is somewhat unfair in terms of a hypertechnical way, and with respect to this --

THE COURT: It's not hypertechnical, I'm just -- I'm just enforcing the --

MR. CHILINGIRIAN: I understand.

THE COURT: -- I'm restricting you to the claim that you made in your -- in your amended complaint a long while ago, and then to the statement of your claim as --as presented in the final pretrial order, and not allowing you to go beyond that on a motion that was filed a few hours before the jury trial was to begin.

MR. CHILINGIRIAN: Okay. One other -- one other --

THE COURT: I'm not, I don't think I'm being hypertechnical.

MR. CHILINGIRIAN: Judge, I apologize. I think you're enforcing the orders as you undertand them. I hope the Court again -- reasonable minds differ, and that's --

THE COURT: I understand.

MR CHILINGIRIAN: -- where I'm from.

Now, I want to address what you said. I don't agree that I can't prove that it was sold. I -- I don't agree with that. I may very well be able to do that, your Honor, either by inference or by direct testimony, if it ever got to the jury.

The issue about the delays, I want the Court to know, that -- again I want the record to be clear -- in -- when I -- when I got into the case in 1989, everything that was accomplished from '89 until your Honor got this -- this file -- it was before Judge Duggan first, and when your Honor got the file was when I first got in.

Your Honor hit the bench, and I apologize, I don't recall the exact date, but it was at or near the time that I got into this case.

THE COURT: I've been here since January 1989.

MR CHILINGIRIAN: Right. I got into the case March of

89.

THE COURT: All right.

MR. CHILINGIRIAN: -- so it's three months after your Honor got --

THE COURT: Okay.

MR. CHILINGIRIAN: -- and you got the file, I think, shortly after you got on the bench.

THE COURT: It came --

MR. CHILINGIRIAN: It was not your file originally.

THE COURT: It came -- it came from Judge Duggan --

MR. CHILINGIRIAN: Right.

THE COURT: -- as -- as I've previously indicated. It was his case originally, and then it was transferred over to me --

MR. CHILINGIRIAN: Yeah.

THE COURT: -- when I took the bench.

MR. CHILINGIRIAN: Yeah. Since 1989, your Honor, I do not believe any of the trial dates -- and again I -- I want to stand corrected on this -- there were no adjournments by the parties, I do not believe. I believe they were -- if there were any because of scheduling, was the Court's. And again it's not a -- I understand the Court's been awfully busy, so any of the delays from '89 to '92, till now, has not in any way -- any motions to adjourn have never occurred by this side; and I don't think counsel has file any motions to adjourn.

THE COURT: Well, I'm just -- the point I'm making is this --

MR. CHILINGIRIAN: It's an old case.

THE COURT: -- it's been five and a-half years --

MR. CHILINGIRIAN: Yes, yes.

THE COURT: -- to get this thing in order --

MR. CHILINGIRIAN: Okay.

THE COURT: -- so that the Court knows, and the jurors know, and so forth, what it is that's being claimed by the Plaintiffs, and the --

MR. CHILINGIRIAN: Every --

THE COURT: -- and to now --

MR. CHILINGIRIAN: every document --

THE COURT: -- ask them to consider claims that are only being made as of a few hour ago --

MR. CHILINGIRIAN: I understand, every --

THE COURT: -- is not fair --

MR. CHILINGIRIAN: -- every --

THE COURT: -- in my estimation.

MR. CHILINGIRIAN: -- every piece of paper, your Honor, that I have, and -- and --and when Mr. Lynam says the powers of this Court -- your Honor, every piece of discovery that was accomplished was done

in terms of the document exchanges. There is certainly numerous documents, and -- and if the Court would want, I could identify them, but it's not necessary -- I'm making the representation to this Court that reasonable jurors could infer from the documents, that it isn't a clerical error -- maybe.

And I also have to tell this Court, back in February, when your Honor ruled, when we had this hearing, I told the Court without Wronski and Streeter in front of this jury, your Honor, I don't have the ability to prove essentially a course of conduct, and a course of dealing --

THE COURT: That's -- that's a different issue.

MR. CHILINGIRIAN: I'm just -- I'm just trying to show the Court what the difficulty has been. You -- you don't have a case, you know, in isolation by itself.

And by taking a step back, let me tell the Court this. When it first came up, we had been prepared because of this problem to voluntarily dismiss without

prejudice; they wouldn't accept it. I know the Court had heard them, essentially an oral motion on that, and it was denied, and it's in the form of an order. We in no way, shape, or form --

THE COURT: Well, you made a proposal to dismiss your case, if they would relieve you from paying some $12,500 in --

MR. CHILINGIRIAN: Sanctions, yes, that's right.

THE COURT: -- sanctions that I'd assessed against you for --

MR CHILINGIRIAN: That's right, that is correct, that's correct.

THE COURT: All right.

MR. CHILINGIRIAN: What I'm pointing out, I guess, is this, your Honor: The Plaintiffs have always know the difficulty in these proofs, and to the extent that you have record keeping, and to the extent that you have those kins of documents that could be presented,

certainly when you present them as the case unfolds, those documents will inherently on their face, suggest logic and common sense.

And what I guess I'm saying to the Court is, again as an officer of the court, I agree that there are no proofs forward; there are substantial proofs, your Honor, substantial --

THE COURT: All right.

MR. CHILINGIRIAN: -- documents back. Thank you.

THE COURT: Okay. Well, it's clear then, however, that you're unable to present any proofs that the -- that the oil was removed surreptitiously, or otherwise, by the Defendant, with no compensation paid to the Plaintiffs during the period November 1984 through March of 1985, is that correct?

MR. CHILINGIRIAN: That's correct, your Honor.

THE COURT: All right. Well, under those

circumstances, it seems to me that there's no -- there are no issues, or no proofs available to be presented to the jury. There's nothing on which the jury could base a verdict in favor of the -- of the Plaintiffs.

Rule 50 of the Federal Rules of Civil Procedure, provide as follows, and I quote:

> "If during a trial by jury, a party has been fully heard with respect to an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party, with respect to that issue, the court mayh grant a motion for judgment as a matter of law against that party, on any claim that cannot under the control of law, be maintained without a favorable finding on that issue."

It seems to me that that's the basis of the motion, rather than Rule 56, which is a summary judgment motion. But whichever it is, either under Rule 50, or Rule 56, the Plaintiff -- from the Plaintiffs' own

representations to the Court this morning, through counsel as an officer of the court, cannot prevail in this case. And therefore, under those circumstances, judgment will be entered for the Defendant in the -- in this case; costs to the Defendants.

MR. CHILINGIRIAN: Your Honor, for the record, the Court is acknowledging my arguments with respect to the --

THE COURT: Pardon me?

MR. CHILINGIRIAN: -- amendment, just so that the record is clear, the Court has acknowledged that I've raised the issues of the liberal rules of amendment, and the procedure that it can even be accomplished after proofs --

THE COURT: You've made -- you've made your record on that. I've denied -- I've denied your motion for leave to amend your -- your pleadings, amend your complaint again, and your motion to amend the -- the pretrial order.

And I've also denied your motion to introduce in your proofs, the opinion of Judge Streeter, and the -- and the decision of the Michigan Court of Appeals in Wronski v. Sun Oil. Yes, I've made those rulings, and that's part of the record here at this time.

All right. If there's any -- if there's nothing further, I'm going to call the jurors in and inform them that there's -- there'll be no further need for their services. You can remain in the courtroom, or you can depart before I make my closing remarks to the jury, as you wish.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH.

Plaintiffs,

VS.

NO.: 87-CV-70451DT
HON. Paul V. Gadola
Entered: July 8, 1992

SUN EXPLORATION AND PRODUCTION COMPANY and SUN OPERATING LIMITED PARTNERSHIP.

Defendants.
_____/

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_____/

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_____/

FINAL PRETRIAL ORDER

At a session of said Court held in the United States District Court for the Eastern District of Michigan, Southern Division, in the City of Detroit, County of Wayne, State of Michigan,

On June 8, 1992

PRESENT: Hon.Paul V. Gadola
U. S. District Judge

This Final Pretrial Order having been submitted to the Court, and the parties, through counsel, having appeared before this Court on June 8, 1992; and the Court being otherwise advised;

NOW IT IS HEREBY ORDERED:

1. Jurisdiction. Jurisdiction is based upon diversity under 28 U.S.C. Section 1332 and is not disputed by the parties.

2. Plaintiffs' Claims. Plaintiffs' claims under Counts I-IV of the Amended Complaint have been dismissed with prejudice by prior Orders of this Court. Certain legal issues contained in Count V have been ruled upon as more specifically indicated infra.

Plaintiffs allege that in November of 1984 through March of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field between November, 1984 and March, 1985 for which Plaintiffs were not compensated. Plaintiffs further allege that "said figures

1984 and March, 1985 for which Plaintiffs were not compensated. Plaintiffs further allege that "said figures were subsequently removed from the production records after an inquiry was made by Eugene Koziara." (Amended Complaint, Paragraphs 45 and 46; Plaintiffs' Claims, submitted October 30, 1990).

Plaintiffs allege that Defendants removed the 881,071 barrels of oil through surreptitious means and conveyed it to other fields within the State of Michigan without compensating Plaintiffs. (Amended Complaint, Paragraph 47).

Plaintiffs allege that the unaccounted-for production came "in large part" from Tract 6 of the field. (Amended Complaint, Paragraph 48).

Plaintiffs allege that, under the laws of the State of Michigan it is a felony to illegally report production and that such laws create "a fiduciary duty to persons such as Plaintiffs on the part of Sun Oil Company". (Amended Complaint, Paragraph 49).

Plaintiffs claim that as a result of Defendants' breach of fiduciary duty, and failure to compensate Plaintiffs for their share of the allegedly unaccounted-

for oil, Plaintiffs have been financially damaged to their detriment. (Amended Complaint, Paragraph 50).

Plaintiffs' claims based upon the statutory creation of a fiduciary duty have been previously ruled upon by this Court in its Order of November 1, 1988 (see pages 9 and 10) to be a failure to state a claim.

Plaintiffs intend to file a Motion to Amend their pleadings to allow for testimony regarding Count V dealing with the time period of June 1974 through March 1985 as it relates to Tracts 1 and 2, along with Tract 6, pertaining to unaccounted-for oil that was produced.

3. Defendants' Claims. Defendants admit that the Monthly Summary of Operations Reports for November, 1984 through March, 1985, showed an additional 881,071 barrels of oil under the columns entitled, "Cumulative Since Project" and "Cumulative Since Discovery", but aver that such entries in said reports were the result of a clerical error regarding production prior to unitization of the Columbus III Field. (Answer, Paragraph 45).

In answer to Plaintiffs' claim that such production was removed from production records, Defendants admit

that the clerical error was subsequently corrected. (Answer, Paragraph 45).

Defendants aver that the 881,071 barrels of oil were produced from the Columbus III Field prior to the June 30, 1974 unitization of the field. (Answer, Paragraph 46 and Affirmative Defenses, Paragraph 1).

Defendants deny that such production came "largely from Tract 6". (Answer, Paragraph 48).

Defendants deny that they "surreptitiously removed" oil from the Columbus III Field and moved it to any other field in Michigan or that oil was removed without properly compensating plaintiffs. (Answer, Paragraph 47).

Defendants assert that Plaintiffs held no interest in the subject property until June, 1984. (Answer, Paragraph 46 and Affirmative Defenses, Paragraph 1).d

Defendants deny that their actions have damaged Plaintiffs in any way. (Answer, Paragraph 50).

4. Stipulation of facts. None.

5. Issues of fact to be litigated.

A. What property interest is held by Plaintiffs and when did they acquire

it?

B. Did Defendants remove oil from the Columbus III field between November, 1984 and March, 1985, which was not properly accounted for?

   i. If so, to where was it removed?

   ii. Was it sold? If so, to whom?

   iii. What revenues, if any were realized from the sale?

   iv. Who received such revenues and when?

   v. If no revenues were received, what was the value of such oil?

C. If Defendants did remove oil that was not properly accounted for, how much oil was so removed?

   i. Of such oil, how much is attributable to Plaintiff's interest?

   ii. What is/was the value of such oil?

   III. What are Plaintiffs' damages as a result of such removal?

D. Was the additional 881,071 barrels of oil shown under the two columns of Defendants' Report to working interest owners between November, 1984 and March, 1985, the result of a clerical error?

6. Issues of law to be litigated.

A. What is the extent and nature of the Plaintiffs' interest in the oil field at the time the alleged fraudulent production occurred?

B. To the extent Plaintiffs establish liability, can the Court determine as a matter of law the rate at which Plaintiffs should be compensated?

7. Evidence problems likely to arise at trial.

Plaintiffs have indicated an intent to introduce evidence relating to events prior to the November 1984 - March 1985 period during which the alleged improper production took place. Defendants dispute the relevance of such evidence.

Plaintiffs intend to file a Motion in limine

regarding the admissibility and effect of the 1974 opinion of Judge Streeter and the Michigan Court of Appeals decision in Wronski v Sun Oil, 89 Mich App 11 (1979) based upon their right to have the jury determine Defendants' credibility relating to the issue of alleged unaccounted-for production of oil.

Defendants object to Plaintiffs' stated intention to call as witnesses M. Y. Joshi and James Sloan.

8. Witnesses. Plaintiffs may call the following witnesses:

A. Edgar J. Dietrich

B. Theresita Dietrich

C. Eugene Koziara

D. Peggy Snyder

E. Catherine Richardson

F. Lee Rae Otto

G. M. Y. Joshi

H. James Sloan

I. Such rebuttal witness(es) as the Court may allow.

Defendants may call the

following witnesses:

J. Any of the above witnesses.

K. Joe Martin

L. Ray Ellison

M. Ben Jonson

N. Rod DeGraw

O. Such rebuttal/surrebuttal witness(es) as the Court may allow.

9. Depositions. Either party may introduce the deposition testimony of Lee Rae Otto taken on July 24, 1985 in Case number 74-4776-NZ, St. Clair County Circuit Court.

Either party may introduce the deposition testimony of Ray Ellison taken de bene esse in this case on May 15, 1992.

10. Exhibits. Exhibit lists of the parties are attached hereto.

11. Damages. Plaintiffs claim that between November, 1984 and March, 1985, Defendants produced 881,071 barrels of oil from the Columbus Field, in which Plaintiffs claim an interest. Plaintiffs damages are measured by the highest value for which such oil is

shown to have been converted during the period from November, 1984 and March, 1985, multiplied by the participation factor as set forth in the Order of Unitization issued by the Supervisor of Wells, Michigan Department of Natural Resources, on June 30, 1974, attributable to the interest owned by Plaintiffs.

12. Trial. Plaintiffs have requested a jury trial. Estimated length of trial is 3 days.

13. Settlement. Counsel for the parties have discussed possible settlement at length. Although the possibility of settlement seems remote at this time, counsel will continue to discuss same.

14. Filing of Trial Briefs, Findings, and Instructions. Trial briefs and requests for instructions shall be filed at least one week prior to the first day of the trial term.

PAUL V. GADOLA
U.S. District Court Judge

APPROVED, June 8, 1992

JACK C. CHILINGIRIAN
Attorney for Plaintiffs

Dated: June 1, 1992

TERENCE V. LYNAM
Attorney for Defendants

Dated: June 1, 1992

R.7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIETRICH et al.,
Civil Action

Plaintiff(s),

No.: 87-70451

vs.

HON. PAUL V. GADOLA
U.S. DISTRICT JUDGE

SUN EXPLORATION April 14, 1992
Defendant(s).
_____/

IMPORTANT: YOU WILL RECEIVE NO FURTHER NOTICE OF THESE DATES.

AMENDED ORDER RE:

1. Scheduling discovery;

2. Setting date for filing of final pre-trial order;

3. Setting date of final pre-trial conference;

4. Setting tentative trial term;

5. Providing for content of final pre-trial order and describing materials to be prepared and to be made available to the court and counsel.

I. Computation of time under this order and under any notice of any scheduling order or notice in this cause shall be in conformity and accordance with Federal Rule of Civil Procedure 77.1.

II. ALL DISCOVERY must be completed by

N/A_____. This Court will not order discovery to take place subsequent to that date.

III. Names of all witnesses, lay and expert, MUST BE EXCHANGED by ___N/A_____.

IV. Dispositive motions due by filed and decided.

V. Referral to mediation panel will be made _____.

VI. Also, a settlement conference may be subsequently scheduled if the court deems it appropriate.

VII. Date and time of final pre-trial conference: 6/8/92 at 2:00 pm.

TRIAL COUNSEL MUST BE PRESENT AT THE FINAL PRE-TRIAL CONFERENCE AND HAVE SETTLEMENT AUTHORITY.

VIII. Final pre-trial order shall be submitted to the Court not later that 6/1/92_.

IX. Trial will be held in trial term beginning 7/1/92. The court utilizes a trailing trial docket.

X. Jury XX Non-jury ____ Estimated length of trial:

XI. At least one week prior to beginning of trial term, all counsel shall furnish to the court the following:

1. A trial brief.

2. A list of all exhibits marked consecutively, as well as copies of all exhibits (to the extent possible) for use on the bench. All exhibits will be received prior to trial, except those where an objection is noted. With reference to those exhibits, they will be received during trial at the proper time.

3. In jury cases, any requests for voir dire and proposed jury instructions.

4. In jury cases, motions in limine.

5. In non-jury cases, proposed findings of fact and conclusions of law.

XII. Other Matters: _____

_____

_____

_____

_____

_____

_____

XIII. IT IS ORDERED that counsel for plaintiff(s) assume the responsibility for convening a conference for all parties to collaborate in the formulation of a short , concise pretrial order that is to be drafted by counsel for plaintiff(s), approved and signed by counsel for all parties, and submitted to the Court for approval and adoption. The order should provide for the signature of the Court, which, when signed, will become an Order of the Court. AN ORIGINAL AND ONE COPY IS TO BE FILED WITH THE COURT.

The proposed pretrial order shall strictly comply with the provisions and requirements of Local Rule 16.2, except as this court may otherwise provide.

LOCAL RULE 16.2

(a) Joint Final Pretrial Order

A Joint Final Pretrial Order shall be furnished in every civil case at or before the time set for the final pretrial conference.

(NOTE: THIS COURT REQUIRES THAT THE JOINT FINAL PRE-TRIAL ORDER BE FURNISHED AT LEAST ONE WEEK BEFORE THE TIME SET FOR THE FINAL PRE-TRIAL CONFERENCE.)

Counsel for plaintiffs shall convene a conference for all parties to confer and collaborate in formulating a concise Joint Final Pretrial Order that is to be compiled by counsel for plaintiffs, approved and signed by counsel for all parties, and submitted by counsel for plaintiffs to the Court for approval and adoption. The Order shall provide for the signature of the court, and, when signed and filed in the Clerk's office, becomes an Order of the court superseding the pleadings and governing the course of the trial unless modified by further Order, provided, however, that the pretrial order shall not constitute a vehicle for adding claims or defenses. An original and one copy is to be submitted to the chambers of the assigned Judge. The Order will not be filed in the Clerks office until it has been signed by the Judge.

(b) CONTENTS OF ORDER

The Joint Final Pretrial Order shall contain, under numbered and captioned headings, the following:

(1) Jurisdiction. The parties shall state the basis for federal court jurisdiction, and whether jurisdiction is contested by any parties.

(2) Plaintiffs' claims. A statement of the claim or claims of plaintiffs, including legal theories.

(3) Defendants' claims. A statement of the defenses or claims of defendants or third parties, including legal theories.

(4) Stipulation of facts. The parties shall state, in separately numbered paragraphs, all uncontested facts.

(5) Issues of fact to be litigated.

(6) issues of law to be litigated.

(7) Evidence Problems likely to arise at Trial. Include objections to exhibits. All motions in limine of which counsel should reasonably be aware shall be listed in the Joint Final Pretrial Order.

(8) Witnesses. Each party shall list the names of all witnesses, identifying which are experts, that it will call (in the absence of reasonable notice to the contrary to opposing counsel), and those witnesses it may all. No witnesses shall be listed who has not been included on any witness list submitted pursuant to a prior order of the Court. Only listed witnesses will be permitted to testify at trial, except for rebuttal witnesses whose testimony could not be reasonably anticipated before trial, or except for good cause show.

(9) Depositions. The parties shall list the names of all witnesses whose deposition testimony is reasonably expected to be offered as evidence. Nothing in this subsection shall preclude the taking of de bene esse depositions for use at trial.

(10) Exhibits. The parties shall number and list, with a short identifying description, each exhibit they intend to introduce at trial. Only listed exhibits will be considered for admission at trial, except for rebuttal exhibits that could not be

reasonably anticipated before trial, or except for good cause shown.

(11) Damages. Plaintiffs shall itemize all claimed damages, shall specify damages that can be calculated from objective data, and the parties shall stipulate to those damages that are not in dispute.

(12) Trial.

(a) Jury or non-jury.
(b) Estimated length of trial.

(13) Settlement. Counsel shall state that they have conferred and considered the possibility of settlement, giving the most recent place and date thereof, and indicate the current status of negotiations, as well as any plans for further discussions.

(c) Failure of Counsel to Cooperate.

Failure of counsel to cooperate in the preparation of, to submit, or to strictly comply with the terms of, the Joint Final Pretrial Order may result in dismissal of claims, default judgment, refusal to let witnesses testify or to admit exhibits, assessment of costs and expenses, including attorney fees, or other appropriate sanctions.

(d) Filing of Trial Briefs, Findings, and Instructions

The Joint Final Pretrial Order shall further provide that trial briefs, proposed findings of fact and conclusions of law in non-jury cases or requests for instructions in jury cases shall be filed in the first day of trial.

(NOTE: THIS COURT REQUIRES THAT THE TRIAL BRIEFS, REQUESTED VOIR DIRE QUESTIONS, EXHIBIT LISTS, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN NON-JURY CASES OR INSTRUCTIONS IN JURY CASES SHALL BE FILED AT LEAST ONE WEEK PRIOR TO FIRST DAY OF TRIAL TERM FOR THIS CASE.)

(e) Additional Requirements.

A Judge, in an appropriate case, may add additional requirements to the Joint Final Pretrial Order, or may suspend application of the rule in whole or in part.

_____
PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Date:_____

UNITED STATES DISTRICT COURT **R.8**
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

Case No. 87-70451
Hon. Paul V. Gadola
Entered Feb. 10, 1992

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This suit involves a royalty interest in tracts of land in the Columbus III oil field in St. Clair County, Michigan. The field is leased to and operated by defendants Sun Exploration Company and Sun Operating Limited Partnership. Plaintiffs Edgar J. and Theresita Dietrich filed their five-count amended complaint April 11, 1988. Count II of plaintiffs' amended complaint has

been dismissed. After numerous motions, including two by defendants for dismissal, defendants have now filed the instant motion for summary disposition (sic). This court will treat the motion as a motion for summary judgment under Fed. R. Civ. P. 56.

FACTS

On November 29, 1971, the owners of Tracts 1, 2 and 6 of the Columbus III oil field, Frank Koziara, Aniela Koziara and Eugene Koziara, assigned a 1/32 overriding royalty interest in Tract 6 and a 1/24 overriding royalty interest in Tracts 1 and 2 to the law firm of Dietrich & Shrauger, P.C. (1.fn) On June 1, 1972, the law firm assigned its interest to Helen Spalter, the mother of plaintiff Edgar Dietrich, for life, remainder to Katherine Dietrich, Edgar Dietrich's daughter. Helen Spalter died on March 25, 1982. On June 1, 1984, the remainder person, Katherine Dietrich, reassigned her interest to plaintiffs.

In the mid-1970's, the Koziaras and the Wronskis, who also owned part of the Columbus III oil field, brought suit in St. Clair County Court to rescind their leases with Sun Oil Company, defendants' predecessor, or, in the alternative, for

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(1.fn) In a previous transaction, defendants' predecessor had transferred part of its working interest back to the Koziaras. It is from this working interest regained by the Koziaras that plaintiffs hold their overriding royalty interest, not from the Koziaras' royalty interest held as a consequence of land ownership.

An "overriding royalty interest" has been defined as a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any exploration or production costs. Meeker v. Ambassador Oil Co., 308 F.2d 875, 822 (10th Cir. 1963), rev'd on other grounds, 375 U.S. 160 (1964). Only when oil and gas are reduced to possession does the interest attach. Mulsow v. Gerber Energy Corp., 697 P. 2d 1269, 1273 (Kan. 1985).

damages from Sun Oil's overproduction of oil from the pool beneath the Koziaras' and Wronskis' properties. At the time of the overproduction, the Michigan Supervisor of Wells had put a proration order in effect, which limited the production of oil from the pool.

The trial court, Judge Streeter, presiding, found that Sun Oil had intentionally and illegally overproduced oil from the field, and that 50,000 barrels of this oil had been illegally drained from the Wronskis' and the Koziaras' tracts. Wronski v. Sun Oil, Nos. 101-7 and 103-7 (St. Clair Cir. Ct. Dec. 21, 1976) ("Streeter Opinion"). The Michigan Court of Appeals affirmed this decision except as to the trial court's computation of damage. Wronski v. Sun Oil Co., 89 Mich App. 11 (1979). leave denies. 407 Mich. 863 (1979) ("Wronski I"). The Michigan Court of Appeals awarded damages as follows:

> The total damages awardable in this case is $251,000 based upon the conversion of 50,000 barrels of oil valued at $5.02 per barrel. Plaintiffs Koziara are entitled to $187,815.85 due to their ownership of 72.835% of the converted oil. Plaintiffs Wronski are entitled to $68,189.15 due to their ownership of 27.165% of the converted oil.

Wronski, 89 Mich. App. at 29 n.10.

The Koziaras and the Wronskis filed another

lawsuit against Sun Oil in 1975 in Ingham County Circuit Court seeking review of two orders issued by the Supervisor of Wells and the Appeals Board. The Wronskis and the Koziaras were challenging the supervisor's decision to grant Sun Oil's request for unitization of the Columbus III field.

> Unitization is a process which permits an entire field to be operated as a single entity without regard to surface boundary lines. When a field is unitized the owners of property within the drilling range are awarded a royalty interest in the whole of what is produced.

Wronski v Sun Oil Co., 108 Mich. App. 178, 181 (1981) ("Wronski II").

The Circuit Court denied the Koziaras' and the Wronskis' request for review of the supervisor's decision, and the Michigan Court of Appeals affirmed. Id.

Neither plaintiff, nor their predecessors in interest, i.e., Dietrich & Shrauger, P.C., Helen Spalter or Katherine Dietrich, were parties to either Wronski I or

Wronski II. Further, in neither Wronski I nor Wronski II did the judge refer to plaintiffs' predecessors' overriding royalty interest.

Plaintiffs brought the present action in Wayne County Circuit Court. In their five-count complaint plaintiffs allege that defendants had illegally drained 36.417.5 barrels of oil from tracts 1, 2 and 6 as found by Judge Streeter in Wronski I (Count I) (2.fn); that defendants illegally overproduced oil from the

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(2.fn) The Michigan Court of Appeals in Wronski I found that 50.000 barrels of oil had been converted and that the Koziaras owned 72.835% of the oil. Wronski, 89 Mich. App. at 29 n.10. The 36,417.5 barrels pleaded by plaintiffs is 72.835% of 50,000 barrels.

fields in addition to the overproduction found by Judge Streeter, in breach of an alleged fiduciary duty to plaintiffs (Count II); that defendants negligently or intentionallyh breached their duty to plaintiffs by failing to use the care and skill of an ordinary and prudent oil producer, including underreporting oil reserves,

sabotaging the well by pouring cement into it and persuading geologists and other witnesses to give false testimony (Count III); that defendants fraudulently induced plaintiffs or their predecessors to sign the unitization agreement (Count IV); and that defendants failed to compensate the plaintiffs for 881.071 barrels of oil allegedly produced by defendants (Count V).

Defendants removed the action to this court based on diversity. Plaintiffs subsequently amended their complaint. Further, Count II of the amended complaint was dismissed by the parties. Defendants have now filed the instant motion for summary judgment. Plaintiffs have filed a response and defendants have filed thir reply.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have (the) effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect (the) application of appropriate principle(s) of law to the rights and obligations of the parties. (Citation omitted.) Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See Gregg

v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'show' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); Gregg, 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving

> party for a jury to return a verdict for that party. If the (nonmovant's) evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omited); See Catrett, 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). Anderson, 477 UJ.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact.

ANALYSIS

The analysis of the defendants' motion for summary judgment will proceed according to the four remaining counts of the plaintiffs' complaint.

A. Count I – Illegal Drainage & Failure to Compensate

Defendants claim that plaintiffs cannot prove that Sun Oil dranied 36,417.5 barrels of oil from Tracts 1, 2 and 6. Defendants point to a lack of expert testimony and to the time and property interest discrepancies between Wronsi I and the instant case. Plaintiffs state that expert testimony is not necessary to show defendants' wrongdoing and that Wronski I is sufficiently similar to the facts in this case to allow the use of offensive collateral estoppel. This court agrees that plaintiffs' experts and the expert testimony used in the Streeter Opinion are insufficient to establish defendants' alleged illegal drainage of oil from Tracts 1, 2 and 6. The use of Wronski I in this case is limited because of the time and property interest discrepancies.

Plaintiffs claim that defendants drained oil from Tracts 1, 2 and 6 of the Columbus III oil field. This has conclusively been established in Wronski I, and

defendants cannot relitigate that issue. However, Wronski I merely establishes, for purposes of this case, that defendants are liable for illegal drainage of the Wronskis' and Koziaras' properties from the period February 1, 1970, to June 30, 1974. Plaintiffs have not held an interest in the oil for that entire period of time. Plaintiffs and their successors in interest have held the overriding royalty interests from November 1, 1971, to June 30, 1974. While 36,417.5 barrels were drained from the Koziaras' property during the 53-month period at issue in Wronski I, there is no indication of the amount of oil drained from the Koziaras' property during the 32-month period at issue here. As there might not have been a steady stream of oil drainage during that time, a simple mathematical percentage may not be appropriate. Plaintiffs' reliance on the Streeter Opinion is therefore misplaced. Expert testimony is needed to establish this data. As plaintiffs have not offered an expert to establish this point in the case, defendants must

prevail on their motion for summary judgment on Count I.

B. Count III – Intentional or Negligent Breach of Duty

In the instant case, defendants are oil and gas producers under an oil and gas lease with the Koziaras. Under Michigan law, an oil or gas producer has a duty to act as a reasonable and prudent oil producer in operating the field and in producing the oil or gas. See Michigan Wis. Pipeline Co. v. Michigan Nat'l Ban, 118 Mich. App. 74. 82-83, 84 (1982); see also Compton v. Fisher-McCall, Inc., 298 Mich. 648, 653 (1941). Plaintiffs' claim in Count III revolves around the allegation that defendants have not acted as resaonable or prudent oil producers.

Plaintiffs assert that defendants negligently or intentionally breached their duty of care in interpreting gas and oil porosity, gas and oil net pay, oil-water contact and other geological and petroleum reservoir

data. Plaintiffs also allege that defendants withheld information about the 6-3 well of the Columbus III oil field by underreporting the oil reserves contained in the well and that defendants sabotaged the well by pouring cement into it. Plaintiffs further allege that defendants provided geologists and other witnesses who were willing to give false testimony at the unitization hearing. Plaintiffs have offered the affidavit and report of Dr. M.Y. Joshi, a petroleum engineer to prove the existence of a genuine issue of material fact in order to avoid defendants' motion for summary judgment.

Defendants have offered the Proposal for Decision, Koziara v. Sun Oil Co., (Mich Dep't Nat. Resources May 25, 1988) (Fulkerson, A.L.J.) ("Fulkerson Proposal") and the Order of the Supervisor of Wells, Koziara v. Sun Oil Co., No. (A) 1-5-73 REMAND (Mich. Dep't Nat. Resources March 22, 1989) ("Order of the Supervisor"), aff'd sub nom. Wronski v. Sun Exploration and Prod. Co., No. 79-22915-AA (Ingham

Cir. Ct. June 12, 1991) (Stell. J.). The Order of the Supervisor adopted the Fulkerson Proposal as the opinion of the supervisor. Plaintiffs were notified of, attended and participated in these hearings. (3.fn) Michigan recognizes the res judicata effect of administrative proceedings. Story v. Meijer, Inc., 431 Mich. 368, 373 n.3 (1988); Harris v. Harlan Elec. Constr. Co., 101 Mich. App. 155, 159 (1980); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). Because the Order of the Supervisor has been affirmed by Judge Stell of the Ingham County Circuit Court, the Fulkerson Proposal shall be given preclusive effect.

(3.fn) See Plaintiffs' Resp. at para. 17.

Most of the issues raised by plaintiffs were raised before Administrative Law Judge Fulkerson and the Supervisor of the Wells. The oil-water contact issue was

litigated before A.L.J. Fulkerson and decided not to be unreasonable. (4.fn) The porosity issue as also decided by A.L.J. Fulkerson in Sun Oil's favor. (5.fn) The entire thrust of the Fulkerson Proposal is that the gas and oil net pay scheme devised by Sun Oil was adequate and reasonable. Further, the 60% current production/40%. volumetrics participation was found to be reasonable. (6.fn)

The fact that Sun Oil did not use a core analysis was considered to be of no consequence to A.L.J. Fulkerson. (7.fn) The isopaching issue was ound to be "a _____

(4.fn) Fulkerson Proposal at 19, 22.

(5.fn) Id. at 19.

(6.fn) Id. at 21-23. This issue arises from Dr. Joshi's Report at para. 1 (Pls.' Ex. B).

(7.fn) Fulerson Proposal at 19. This issue also arises from Dr. Joshi's Report at para. 4 (Pls.' Ex. B).

fair and equitable presentation of the value for oil or each tract when compared to the other tracts in the pool."

(8.fn) The planimetering error was found to be corrected, otherwise being insignificant. (9.fn) Finally, A.L.J. Fulkerson definitively found that Sun Oil did not cement the 6-3 well and that Sun Oil would have nothing to gain from doing so. (10. fn)

The last issue raised by plaintiffs, that defendants procured and provided geologists and other witnesses to falselyh testify before the unitization hearing, is an issue to be brought before the Michigan Department of Natural Resources to collaterally attack the unitization order. As neither party is challenging that order and as the Fulkerson Proposa, the Order of the Supervisor and its affirmance from Judge Stell are not being collaterally attacked, then the issue of perjury or its subornation is not before this court.

Because all of the allegations have been precluded or shown to be irrelevant to plaintiffs' case, defendants' motion for summary judgment on Count III of

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(8.fn) Fulkerson Proposal at 20. This issue also arises from Dr. Joshi's Report at para. 5 (Pls.' Ex. B).

(9.fn) Fulkerson Proposal at 20. This issue also was brought up by Dr. Joshi in his report at para. 6 (Pls.' Ex. B).

(10.fn) Fulkerson Proposal at 14.

plaintiffs' complaint shall be granted.

C. Count IV -- Fraudulent Inducement

In this count, plaintiffs essentially charge defendants with misrepresenting certain facts to their predecessors, other landowners and the Michigan Department of Natural Resources. Plaintiffs state that because of these misrepresentations, plaintiffs' and/or their predecessors were induced to sign the unitization plan. Because the unitization plan was signed, plaintiff sllege that they were denied their fair share of the unitization production and lost out on royalty revenues due them.

Defendants indicate that plaintiffs' concerns with the unitization plan were addressed by the Fulkerson

Proposal and are therefore barred by collateral estoppel. Defendants further state that they did not make any misrepresentations to the plaintiffs or any other individuals in privity with the plaintiffs. Additionally, defendants state that any representations, if made, were true. Finally, defendants assert that even if misrepresentations were made to plaintiffs or their predecessors in interest, no harm came to plaintiffs' because of them.

This court agrees with defendants that plaintiffs have failed to carry their burden of production in this motion for summary judgment. Any assertion made by plaintiffs that challenges the fairness and validity of the unitization plan is estopped by reason of the Fulkerson Proposal as adopted by the Order of the Supervisor and affirmed by Judge Stell. Storey, 431 Mich. at 373 n.3. Further, any claim that the defendants acted unreasonably in connection to the unitization plan after its implementation is precluded. See supre pp. 8-11.

In paragraph 31 of the amended complaint plaintiffs state that defendants advised them "that unitization would increase the overall royalties paid to Plaintiffs." Defendants assert that plaintiffs' own expert. Dr. Joshi, admits that unitization enhanced the total oil and gas recovered from the field. (11.fn) Plaintiffs counter this allegation by stating that

> the issue is not whether, in fact, without misrepresentations Plaintiffs would have received the revenues they did or received more had unitization not taken place, but whether, in fact, pursuant to the Unitization Order itself the tract participation formula which was utilized is accurate.

(11.fn) Even assuming that plaintiffs' expert did not agree with the alleged representation that unitization would increase the overall royalties, this statement allegedly made by defendants could easily be read as a hope or opinion, not an assurance given by Sun Oil to plaintiffs. See Wilson v. Kiss, 751 F. Supp. 1249, 1255 (E.D. Mich. 1990); Connellan v. Himelhoch, 506 F.

Supp. 1290, 1296 (E.D. Mich. 1981); Schuler v. American Motors Sales Corp., 39 Mich. App. 276, 280 (1972).

Plaintiffs' Resp. at para. 28. If the issue is whether the tract participation formula was accurate, then plaintiffs again are precluded, as this issue was decided in Sun Oil's favor by A.L.J. Fulkerson. Plaintiffs' predecessors in interest were present at the proceedings initiating the unitization plan, and plaintiffs are therefore bound by A.L>J> Fulkerson's proposal.

Plaintiffs have also failed to produce any evidence that shows that plaintiffs or their predecessors in interest relied upon any misrepresentations made by defendants. Defendants have affirmatively cited the deposition of plaintiff Edgar Dietrich, who acknowledges that no representations alleged in Count IV were made to him. (12.fn) Edgar Dietrich also stated that he had no knowledge of any representation made to Helen Soalter

(13.fn) and that the alleged misrepresentations otherwise stated in Count IV were made to the Supervisor of Wells.(14.fn) Plaintiffs do not offer any rebuttal evidence, either by deposition, affidavit or otherwise, except for the affidavit of Dr. Joshi, who conclusorily states that "(d)efendants clearly misrepresented the facts to the Dietrichs' predecessors

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(12.fn) Edgar Dietrich Dep. at 58, lines 16-19.

(13.fn) 59, lines 18-20.

(14.fn) Id. at 56-60.

to obtain their agreement to the Unitization." (15.fn) Dr. Joshi's bald statement is hearsay at best and would not be presentable as expert testimony at trial. See Anderson, 477 UJ.S. at 249-=50. Further, his statement is not significantly probative. See id. at 250.

Finally, defendants assert that plaintiffs will not and cannot prove damages arising out of the alleged

misrepresentations contained in Count IV. Plaintiffs state that the tract participation formula was not fair and appropriate under the factual circumstances .....(16.fn) Once again, any contention that the tract participation formula was unfair or inaccurate or invalid is precluded by the Fulkerson Proposal and the order implementing the unitization plan. As plaintiffs and their predecessors in interest were present at both, plaintiffs are properly precluded from relitigation the same issues.

Because plaintiffs have failed to set forth specific evidence pointing to a genuine triable issue that plaintiffs or their predecessors in interest were fraudulently induced to agree to the unitization plan, or that plaintiffs were harmed by any alleged misrepresentations by defendants, summary judgment on Count IV _____

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(15.fn) Joshi Aff. at para. 14.

(16.fn) Plaintiffs' REsp. at para.30.

is appropriate. Gregg, 801 F.2d at 861.

D. Count V -- Fraudulent Production

In Count V, plaintiffs claim that between November 1984 and March 1985 Defendants produced an additional 881.071 barrels of oil in the Columbus III oil field that had not previously been accounted for. Plaintiffs offer up certain Sun Oil records indicating that 881.071 barrels of oil were produced in this six-month period, but that plaintiffs and other landowners were not given any royalties. Defendants counter that this was a clerical error and offer the affidavit of Ms. Leerae Otto, Sujn Oil's senior accounting assistant, and an interoffice memorandum to support their argument.

As both sides have documentation supporting their theories, there appears to be a genuine issue of material fact as to whether the 881.071 barrel count was a legitimate discrepancy and whether defendants owe plaintiffs royalties on this oil production. Because there is a genuine issue of material fact, summary judgment

will be denied on Count V.

ORDER

For the foregoing reasons, it is hereby ORDERED that defenants' motion for summary judgment is GRANTED on Counts I, II and IV of the amended complaint.

It is further ORDERED that defendants' motion for summary judgment is DENIED on Count V of the amended complaint.

SO ORDERED.

Dated: 2/10/92

PAUL V. GADDLA
United States District Judge